DOCKET

No. 08-472
Title: Ken L. Salazar, Secretary of the Interior, et al., Petitioners
v.
Frank Buono
Docketed: October 10, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-55852)
Decision Date: May 14, 2008
Questions Presented

Date	Proceedings and Orders
Jul 28 2008	Application (08A87) to extend the time to file a petition for a writ of certiorari from August 12, 2008 to September 11, 2008, submitted to Justice Kennedy.
Aug 6 2008	Application (08A87) granted by Justice Kennedy extending the time to file until September 11, 2008.
Aug 27 2008	Application (08A87) to extend further the time from September 11, 2008 to October 11, 2008, submitted to Justice Kennedy.
Aug 28 2008	Application (08A87) granted by Justice Kennedy extending the time to file until October 10, 2008.
Oct 10 2008	Petition for a writ of certiorari filed. (Response due November 10, 2008)
Oct 29 2008	Order extending time to file response to petition to and including December 10, 2008.
Nov 10 2008	Brief amici curiae of Veterans of Foreign Wars of the United States, et al. filed.
Dec 4 2008	Order further extending time to file response to petition to and including January 9, 2009.
Jan 8 2009	Brief of respondent Frank Buono in opposition filed.
Jan 16 2009	Reply of petitioners Dirk Kempthorne, Secretary of the Interior, et al. filed.
Jan 21 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	Petition GRANTED.
Mar 12 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 22, 2009.
Mar 12 2009	The time within which to file respondent's brief on the merits is extended to and including July 17, 2009.
May 8 2009	The time within which to file the joint appendix and petitioners' brief on the merits is further extended to and including June 1, 2009. Respondent's brief on the merits is due on or before July 27, 2009.
Jun 1 2009	Joint appendix filed. (Statement of costs received.)
Jun 1 2009	Brief of petitioner Ken L. Salazar, Secretary of the Interior, et al. filed.
Jun 4 2009	Brief amicus curiae of Foundation for Free Expression filed.
Jun 5 2009	Brief amici curiae of Fidelis Center for Law & Policy, et al. filed.
Jun 5 2009	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Jun 8 2009	Brief amici curiae of Utah Highway Patrol Association, and Robert F. Mackey filed.
Jun 8 2009	Brief amici curiae of American Center for Law and Justice, et al. filed.
Jun 8 2009	Brief amici curiae of Indiana, et al. filed.
Jun 8 2009	Brief amicus curiae of The Becket Fund for Religious Liberty filed.
Jun 8 2009	Brief amici curiae of Christian Legal Society, et al. filed.

Jun 8 2009	Brief amicus curiae of Liberty Counsel filed.
Jun 8 2009	Brief amicus curiae of International Municipal Lawyers Association filed.
Jun 8 2009	Brief amicus curiae of National Legal Foundation filed.
Jun 8 2009	Brief amicus curiae of American Civil Rights Union filed.
Jun 8 2009	Brief amicus curiae of American Legion Department of California filed.
Jun 8 2009	Brief amicus curiae of Boys Scouts of America filed.
Jun 8 2009	Brief amici curiae of Citizens United Foundation, et al. filed.
Jun 8 2009	Brief amicus curiae of Foundation for Moral Law filed.
Jun 8 2009	Brief amici curiae of Thomas More Law Center, et al. filed.
Jun 8 2009	Brief amici curiae of Faith and Action, et al. filed.
Jun 8 2009	Brief amici curiae of Veterans of Foreign Wars of the United States, et al. filed.
Jun 22 2009	Motion for leave to intervene filed by Veterans of Foreign Wars of the United States, e (CL Page 162)
Jul 1 2009	Motion DISTRIBUTED for Conference of September 29, 2009.
Jul 1 2009	Respondent's response to motion of Veterans of Foreign Wars of the United States Post 385, et al. for leave to intervene filed. (Distributed)
Jul 13 2009	Reply in support of motion of Veterans of Foreign Wars of the United States, et al. (Distributed).
Jul 16 2009	SET FOR ARGUMENT ON Wednesday, October 7, 2009.
Jul 17 2009	CIRCULATED.
Jul 23 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 24 2009	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jul 27 2009	Brief of respondent Frank Buono filed. (Distributed)
Jul 31 2009	Brief amici curiae of American Humanist Association, et al. filed. (Distributed)
Aug 3 2009	Brief amici curiae of Former High-Ranking Military Officials Colonel David Antoon, et al. filed. (Distributed)
Aug 3 2009	Brief amici curiae of American Jewish Congress, et al. filed. (Distributed)
Aug 3 2009	Brief amici curiae of Public Employees for Environmental Responsibility, et al. filed. (Distributed)
Aug 3 2009	Brief amicus curiae of Center for Inquiry filed. (Distributed)
Aug 3 2009	Brief amicus curiae of Jewish Social Policy Action Network filed. (Distributed)
Aug 3 2009	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. (Distributed)
Aug 3 2009	Brief amicus curiae of Jewish War Veterans of the United States of America, Inc. filed. (Distributed)
Aug 3 2009	Brief amici curiae of Baptist Joint Committee for Religious Liberty and the Interfaith Alliance filed. (Distributed)
Aug 3 2009	Brief amicus curiae of Freedom From Religion Foundation filed. (Distributed)
Aug 3 2009	Motion of Veterans of Foreign Wars of the United States, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Aug 3 2009	Brief amici curiae of American Muslim Armed Forces and Veterans Affairs Council, et al. filed. (Distributed)
Aug 13 2009	Record received from U.S.D.C. for the Central District of California. (1 box)

Aug 26 2009	Reply of petitioners Ken L. Salazar, Secretary of the Interior, et al. filed. (Distributed)
Sep 4 2009	Motion of Veterans of Foreign Wars of the United States, et al. for leave to participate in oral argument and for divided argument DENIED.
Oct 5 2009	Motion for leave to intervene filed by Veterans of Foreign Wars of the United States, et al. DENIED.
Oct 7 2009	Argued. For petitioners: Elena Kagan, Solicitor General, Department of Justice, Washington, D.C. For respondent: Peter J. Eliasberg, Los Angeles, Cal.

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PETITION FOR WRIT OF CERTIORARI

08-472 OCT 10 2008

No.

In the Supreme Court of the United States

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross as a memorial to fallen service members in a remote area within what is now a federal preserve. After the district court held that the presence of the cross on federal land violated the Establishment Clause and the court permanently enjoined the government from permitting the display of the cross, Congress enacted legislation directing the Department of the Interior to transfer an acre of land including the cross to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, and the court of appeals affirmed. The questions presented are:

1. Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

PARTIES TO THE PROCEEDINGS

The petitioners are Dirk Kempthorne, Secretary of the Interior; Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, Department of the Interior; and Dennis Schramm, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior.

The respondent is Frank Buono.

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In the Supreme Court of the United States

No.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Dirk Kempthorne, Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 54a-85a, 100a-113a) are reported at 527 F.3d 758 and 371 F.3d 543. The opinions of the district court (App., *infra*, 86a-99a, 114a-144a) are reported at 364 F. Supp. 2d 1175 and 212 F. Supp. 2d 1202.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. The judgment was amended and a petition for rehearing was denied on May 14, 2008 (App., *infra*,

35a-85a). On August 6, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 11, 2008, and on August 28, 2008, Justice Kennedy further extended the time to and including October 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 147a-149a.

STATEMENT

1. In 1934, the Veterans of Foreign Wars (VFW) erected a memorial to fallen service members in the form of a wooden cross set at or an outcropping known as Sunrise Rock, which is located on federal land in what is now the Mojave National Preserve (Preserve) in San Bernardino County, California. App., *infra*, 56a, 101a. The cross had a plaque identifying it as a war memorial that read: "The Cross, Erected in Memory of the Dead of All Wars. Erected 1934 by Members of Veterans of Foregin [*sic*] Wars, Death Valley Post 2884." *Id.* at 56a. Private parties have since replaced the cross several times, but there is no longer a plaque at the site. *Ibid.* The current cross is between five and eight feet high and is constructed of four-inch diameter metal pipes that are painted white. *Id.* at 55a.

The Preserve contains approximately 1.6 million acres, approximately 90% of which are federally owned. App., *infra*, 3a. The cross, which is located in a "remote location" with few signs of humanity, can be seen from approximately

100 yards away on a secondary road called Cima Road. *Id.* at 111a, 118a, 122a.

In 1999, the National Park Service (NPS) denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross. App., *infra*, 56a-57a. The following year, Congress prohibited the NPS from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230. One year later, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. That legislation also ordered the Secretary of the Interior to acquire a replica of the original plaque and cross, to install the replica plaque at the memorial, and to determine by survey "[t]he exact acreage and legal description of the property" included in the memorial. § 8137(b) and (c), 115 Stat. 2278-2279.[1]

2. Alleging that the presence of the cross on federal land violates the Establishment Clause, respondent Frank Buono filed this action in March 2001. Respondent lives in Oregon, but alleged that he regularly visits the Preserve, where he was formerly employed as an Assistant Superintendent. App., *infra*, 104a-105a. A practicing Roman Catholic, respondent never complained about the cross during his NPS employment, and he "does not find a cross itself objectionable." *Id.* at 123a. Instead, respondent asserted

[1] Later in 2002, Congress prohibited the spending of any federal funds to remove any World War I memorial. Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551.

that he is offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." 03-55032 C.A. E.R. 14. Respondent claimed that he would avoid the cross on future visits to the Preserve. App., *infra*, 107a.

The district court entered judgment for respondent, App., *infra*, 114a-144a, and permanently enjoined the government from "permitting the display of the * * * cross," *id.* at 146a. The court held that respondent has standing because he was "subjected to an unwelcome religious display, namely the cross," *id.* at 131a, and that the presence of the cross on federal land violates the Establishment Clause because "the primary effect of" a public display of the cross "advances religion," *id.* at 139a.[2]

3. While the government's appeal was pending, Congress enacted legislation ordering the Department of the Interior to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. The legislation directed the Department of the Interior to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d), 117 Stat. 1100. Congress further provided that, "[n]otwith-

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[2] The court of appeals stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross." App., *infra*, 87a. The government subsequently covered the cross with a large plywood box, and the cross remains so covered. See *id.* at 88a.

standing the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" set forth in Section 8137 of the 2002 Act—including the installation of a replica plaque—and that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." § 8121(a) and (e), 117 Stat. 1100.

4. The court of appeals subsequently affirmed the judgment of the district court. App., *infra*, 100a-113a. The court rejected the government's argument that respondent lacks standing to maintain this action because his only asserted injury is an ideological, rather than religious, objection concerning other persons' rights to erect other symbols. *Id.* at 105a-107a. Instead, the court held that respondent had standing under its prior precedents holding "that inability to unreservedly use public land suffices as injury-in-fact." *Id.* at 107a.

On the merits, the court of appeals held that the case is "squarely controlled" by its prior decision in *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam), which held that a cross displayed in a city park violated the Establishment Clause. App., *infra*, 108a. "[E]xpress[ing] no view as to whether a transfer completed under section 8121 [of the 2004 Act] would pass constitutional muster," the court "le[ft] the question for another day." *Id.* at 104a.

5. On remand, respondent asked the district court to hold that the land transfer would violate the court's permanent injunction and the Establishment Clause. See App., *infra*, 86a-99a. The court determined that the 2004 Act was an unlawful attempt to evade its injunction because, in the court's view, "the government's apparent endorsement of a particular religion has not actually ceased," and "the pro-

posed transfer of the subject property can only be viewed as an attempt to keep the * * * cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.* at 94a, 97a. As such, the court permanently enjoined the government "from implementing the provisions of Section 8121 of [the 2004 Act]." *Id.* at 99a.

6. a. A panel of the court of appeals affirmed. App., *infra*, 54a-85a. The panel observed that "the Seventh Circuit adopted a presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances.'" *Id.* at 25a n.13 (quoting *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000)). Nonetheless, the panel "decline[d] to adopt such presumption." *Ibid.* Instead, the court determined that the 2004 Act violated the permanent injunction because the land transfer would not cause "government action endorsing religion [to] actually cease[]." *Id.* at 76a. Accordingly, the court held that the land transfer "cannot be validly executed without running afoul of the injunction." *Id.* at 85a.

The court of appeals panel relied in part on what it viewed as "continuing government control" of the property following a land transfer. App., *infra*, 78a. The 2004 Act provides for the land to revert to the government if the Secretary of the Interior determines that the VFW is no longer maintaining a *war memorial* on the site, and the court of appeals construed that provision to require the VFW to maintain a *cross* at the site. *Id.* at 73a-74a, 80a. In the court's view, NPS would also continue to have "general supervisory and managerial responsibilities" and would have an implied easement to enter the property to install a replica of the original plaque pursuant to Section 8137 of the 2002 Act. *Id.* at 78a, 79a.

The court of appeals panel also relied on two other factors: the government's "long-standing efforts to preserve and maintain the cross," App., *infra*, 83a; and the fact that the land exchange was not initiated by NPS pursuant to the procedures that govern agencies' decisions to exchange lands within their jurisdictions, but instead was directed by Congress in an appropriations bill, *id.* at 81a-82a. In the court's view, those factors demonstrated that "the government's purpose in this case is to evade the injunction and keep the cross in place" "without actually curing the continuing Establishment Clause violation." *Id.* at 83a, 84a.[3]

b. After the government filed a petition for rehearing, the court of appeals panel amended its opinion to delete the portion of its decision that expressly acknowledged a conflict with the Seventh Circuit. App., *infra*, 35a-37a. As amended, the opinion now states that, "to the extent [the Seventh Circuit's decision in] *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; see *id.* at 77a n.13.

c. With five judges dissenting, the court of appeals denied en banc review. App., *infra*, 37a-53a. Judge O'Scannlain's dissent, joined by four other judges, explained that "[t]he opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated." *Id.* at 37a. In the dissenters' view, that "novel rule contravenes governing Supreme

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[3] The court of appeals also determined that the dispute was ripe for review, in part because the government began the land exchange before the district court enjoined it, and the government had intended to complete the exchange. App., *infra*, 67a. That ruling is not challenged here.

Court precedent" and "creates a split with the Seventh Circuit on multiple issues." *Ibid.*

Judge O'Scannlain explained that—as the panel had initially acknowledged, App., *infra*, 25a n.13—the panel opinion "squarely contradicts" the Seventh Circuit's holdings in *City of Marshfield* and *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693 (2005). App., *infra*, 41a. Because there is no evidence that the government will "maintain or support the Sunrise Rock cross after the land transfer," the dissenters saw no basis to impugn the Act of Congress directing the land transfer. *Id.* at 43a.

The dissenters further determined that the cross "serves the secular purpose of memorializing fallen soldiers." App., *infra*, 47a. Indeed, "[a]s was the case in *Van Orden* [v. *Perry*, 545 U.S. 677 (2005)], the Sunrise Rock memorial was constructed by a private, secular organization * * * away from a captive audience, and * * * packaged with a 'nonsectarian text' evincing a clearly secular purpose." *Ibid.* (quoting *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment)). Further, Judge O'Scannlain suggested, "the lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose." *Id.* at 48a.

Finally, Judge O'Scannlain "fail[ed] to see why the government's past, unsuccessful efforts" with respect to the cross "should foreclose it from pursuing [the] further *legitimate* efforts" at issue here. App., *infra*, 52a. Indeed, considering that the court of appeals had previously held that the display of the cross was unconstitutional because it was on public land, the dissent thought that the panel's decision faulting the government for transferring ownership of the land was "nothing short of a judicial 'bait-and-switch.'" *Id.* at 53a. "If anything," Judge O'Scannlain explained, "trans-

ferring the land was the obvious next step in attempting to cure the violation" identified by the Ninth Circuit in the prior appeal. *Ibid.*

REASONS FOR GRANTING THE PETITION

Over the dissent of five judges from the denial of rehearing en banc, the Ninth Circuit has held invalid a land transfer mandated by an Act of Congress and required the federal government to tear down a cross that has stood for 70 years as a memorial to fallen service members. As the dissenting judges recognized, Congress's decision to transfer an acre of land including the Sunrise Rock war memorial to the VFW was an eminently sensible and constitutionally permissible way of resolving any Establishment Clause problem presented by the continued display of the cross on federal land while, at the same time, avoiding the appearance of hostility toward either religion or the memorial to fallen service members. In addition, as the dissenters also observed, the court of appeals' decision conflicts with Seventh Circuit precedents authorizing such land transfers as legitimate means of curing Establishment Clause violations.

Moreover, the court of appeals issued its decision effectively invalidating—by refusing to give effect to—an Act of Congress in a case where the sole plaintiff lacked standing because he testified that, as a practicing Roman Catholic, he does *not* generally object to displays of crosses, but instead has only the ideological objection that public lands on which crosses are displayed should also be public fora on which *other* persons may display *other* symbols. By stretching to find standing and then requiring the government to tear down a 70-year-old war memorial instead of giving effect to the congressionally mandated land transfer, the court deviated from this Court's decisions, overrode an Act of Congress, and unnecessarily fostered the very divi-

siveness that the Establishment and Free Exercise Clauses are supposed to prevent. Such an unsettling exercise of judicial power warrants this Court's review.

I. THE COURT OF APPEALS' STANDING HOLDING WARRANTS REVIEW

Standing requirements impose important "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)); see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340-342 (2006). They do so in part by ensuring that "the decision to seek review" "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)). That is particularly important in the Establishment Clause context, where tearing down longstanding symbols can "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); see *id.* at 699.

Here, it is undisputed that tearing down the cross, which has stood as a memorial to fallen service members for over 70 years, "could lead to significant public opposition." App, *infra*, 120a-121a. Nonetheless, the court of appeals ordered the government to do just that at the request of a plaintiff who raised no spiritual objection to the display of the cross (a symbol of his own religion), but only an ideological objection concerning the rights of *others* to display *other* symbols. The court of appeals' erroneous standing holding warrants review because it is important in its own

right, it oversteps judicial bounds in the course of refusing to give effect to an Act of Congress, and the courts of appeals are divided on the correct interpretation of this Court's Establishment Clause standing cases.[4]

A. The Ninth Circuit's Standing Ruling Conflicts With This Court's Precedent

1. To have standing under Article III of the Constitution, a plaintiff must have suffered "an 'injury-in-fact'—an invasion of a legally protected interest" that was caused by the complained-of conduct, and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Among the additional "prudential dimensions" of standing are "the general prohibition on a litigant's raising another person's legal rights * * * and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove*, 542 U.S. at 12

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[4] The government challenged respondent's standing through the first appeal in this case, see App., *infra*, 104a-105a, but did not raise standing again on remand or during the second appeal because the government's arguments had already been considered and rejected by the court of appeals, see *id.* at 104a-107a. The Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Congress's enactment of the legislation directing the land transfer does not alter that conclusion because Congress enacted the legislation *before* the first appeal was decided, see App., *infra*, 102a-103a, and respondent's purported injury (from the display of the cross) remained the same. In any event, this Court must consider standing on its own motion even when (unlike here) the question was not raised in the lower courts. *E.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998).

(quoting *Allen*, 468 U.S. at 751); see *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982).

In the Establishment Clause context as in others, that means that an ideological or policy disagreement does not give rise to standing. See *Valley Forge*, 454 U.S. at 485-487. In *School District* v. *Schempp*, 374 U.S. 203 (1963), the Court held that school children and their parents had standing to challenge mandatory Bible readings in school that "directly affected" them. *Id.* at 224 n.9. This Court has explained that *Schempp* stands for the proposition that "[a] person or a family may have a *spiritual* stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) (emphasis added). In *Valley Forge*, however, the Court confirmed that *ideological* objections do not give rise to standing to bring Establishment Clause challenges. In that case, the United States had transferred a parcel of land to a religious organization. 454 U.S. at 468. The Court held that the plaintiffs lacked standing to challenge the transfer under the Establishment Clause because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Court explained that "[i]t is evident that [the plaintiffs] are firmly committed to the constitutional principle of separation of church and State," but in the Establishment Clause context as elsewhere, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

2. So too here, respondent may be "firmly committed to the constitutional principle of separation of church and State," but he has not proven any personal injury "other

than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485, 486. Indeed, respondent has disclaimed any spiritual injury stemming from the display or transfer of the cross. Respondent testified that he is a Roman Catholic, that he attends mass at a church that displays crosses, and that he "[o]bviously" does not "find the cross, itself, offensive." 03-55032 C.A. E.R. 59; see *id.* at 14, 27.

Nor has respondent asserted that he finds the display of a cross on public (as opposed to private) land inherently offensive. Instead, he asserted that he is offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." 03-55032 C.A. E.R. 14. According to respondent, "[t]he presence of the Cross *along with the exclusion of other freestanding, permanent displays* adversely affects [his] use and enjoyment of the area." *Ibid.* (emphasis added); see *id.* at 27 ("I do strongly object to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs."). Thus, the district court determined that it is "uncontroverted" that respondent "does not find a cross itself objectionable," but instead is "offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose." App., *infra*, 116a, 123a; see *id.* at 105a. In sum, respondent has asserted only the ideological or legal objection that public lands on which crosses are displayed should also be open forums in which *other* people have the option of displaying *other* symbols. Under *Valley Forge*, that is not a cognizable injury for purposes of establishing standing to bring an Establishment Clause challenge.

Indeed, the ideological nature of respondent's objection is underscored by the fact that he seeks to premise his *own* standing on the asserted rights of *third parties* to participate in an open forum. Making Sunrise Rock available for other symbols would fully redress respondent's asserted grievance, but that does not mean that others *would* erect symbols; it just means that they *could*. As a result, even if the government attempted to redress respondent's asserted psychic injury by making Sunrise Rock an open forum, the cross might well remain alone at that remote desert location, just as it is now. The only difference would be *third parties'* ability to erect additional symbols if they wished to do so. That is an inadequate basis for *respondent* to claim a personal injury. Because "constitutional rights are personal and may not be asserted vicariously," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), the Court has long "express[ed] a 'reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Sprint Comms. Co., L.P.* v. *APCC Servs., Inc.*, 128 S. Ct. 2531, 2544 (2008) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)); see *Valley Forge*, 454 U.S. at 474; *In re Navy Chaplaincy*, 534 F.3d 756, 760, 763 (D.C. Cir. 2008).[5]

3. The court of appeals construed *Valley Forge* to hold only that the plaintiffs in that case had not established "any personal injury at all, economic or non-economic," that

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[5] This case is therefore unlike *Pleasant Grove City, Utah* v. *Summum*, No. 07-665 (oral argument scheduled for Nov. 12, 2008). In *Pleasant Grove*, a religious group brought suit under the First Amendment's Free Speech Clause challenging a city's refusal to erect a monument of the group's choosing in a public park. Here, in contrast, respondent does not *himself* wish to erect a symbol on Sunrise Rock, and merely objects that *other* people may not erect displays of *their* choosing.

accompanied "'the psychological consequence' plaintiffs experienced in observing 'conduct with which [they] disagree[d].'" App., *infra*, 106a (quoting *Valley Forge*, 454 U.S. at 485). But the only additional injury the court of appeals identified here is respondent's choice to "tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." *Id.* at 107a (quoting *id.* at 123a). If respondent cannot premise standing on the psychological consequence of seeing the cross, he certainly cannot premise standing on his own decision *not* to see the cross because of his concerns about other persons' interests.

The government did not require respondent to drive along a different route when he visits the Preserve; respondent made that decision on his own. And such "self-inflicted" injuries do not establish standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976); accord *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003). Otherwise, the plaintiffs in *Valley Forge* could have conferred standing on themselves by paying to consult a psychiatrist or making some other symbolic sacrifice (or even by relying on the costs of petitioning the government for a redress of their grievances, cf. *Steel Co.*, 523 U.S. at 107-108). See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) ("If offense is not enough, why is a detour attributable to that offense enough?").

To be sure, if exposure to the cross constituted a cognizable injury, a plaintiff's need to take a different route in order to avoid that injury could give rise to standing. But when the alleged direct injury that is fairly traceable to the government's conduct is not cognizable for standing purposes, plaintiffs cannot bootstrap themselves into standing by choosing to inflict an additional or different injury on

themselves. See, *e.g.*, *McConnell*, 540 U.S. at 228; *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).[6]

B. The Courts Of Appeals Are Divided On The Correct Interpretation Of This Court's Establishment Clause Standing Cases

The court of appeals' standing holding reflects a fundamental disagreement among the courts of appeals on the correct interpretation of *Valley Forge*. The circuit courts have long found "the concept of injury for standing purposes [to be] particularly elusive in Establishment Clause cases." *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987); accord *Murray* v. *City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991), cert. denied, 505 U.S. 1219 (1992). That confusion is reflected in a circuit split, because "[t]he circuit courts have interpreted *Valley Forge* in different ways." *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990); accord *Suhre* v. *Haywood County*, 131 F.3d 1083, 1087-1088 (4th Cir. 1997).

Some courts of appeals have held that, to establish standing, a plaintiff need only show that he had "direct personal contact with the offensive action." *Foremaster*, 882 F.2d at 1490; accord *Suhre*, 131 F.3d at 1086-1088. The

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[6] The doctrine of taxpayer standing does not provide an alternative basis for standing because respondent (who has not asserted taxpayer standing) does not challenge a congressional enactment that rests on the Taxing and Spending Clause. See *Valley Forge*, 454 U.S. at 478-480; see also *Hein* v. *Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2565-2566 & n.5, 2569 (2007) (plurality opinion). Instead, as in *Valley Forge*, the taxpayer-standing doctrine is inapplicable because the land transfer "was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2" of the Constitution. *Valley Forge*, 454 U.S. at 480.

Ninth Circuit also appears to follow that standard. See App., *infra*, 107a ("We have repeatedly held that inability to unreservedly use public land suffices."); see *id.* at 133a (citing cases). One circuit has gone farther by not even requiring such contact; the Eleventh Circuit held that plaintiffs had standing to challenge the display of a cross even though they had never seen it or visited its location, and thus did not have the direct, personal contact required by other circuits. See *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 & n.17 (1983).

In contrast, the Seventh Circuit has held that direct, personal contact with a religious symbol does not ordinarily suffice for standing, because it amounts to no more than "[t]he psychological harm that results from witnessing conduct with which one disagrees." *Freedom from Religion Found, Inc.*, v. *Zielke*, 845 F.2d 1463, 1467 (1988). Instead, in the Seventh Circuit, only plaintiffs who have "altered their behavior" in response to a religious symbol ordinarily have standing. *Id.* at 1468; see *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir.), cert. denied, 479 U.S. 961 (1986).[7] In the Third Circuit, then-Judge Alito also noted that the psychological consequences of unwelcome contact with a religious display are arguably insufficient to confer standing, but found it unnecessary to resolve the question in that case. *ACLU* v. *Township of Wall*, 246 F.3d 258, 265-266 (2001).

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[7] Further deepening the doctrinal complexity, the Seventh Circuit has carved out an exception by recognizing standing for a plaintiff who must come into contact with a religious symbol in order "to participate fully as [a] citizen[] . . . and to fulfill . . . legal obligations," such as by attending a proceeding at a courthouse. *Books* v. *Elkhart County*, 401 F.3d 857, 861 (2005) (quoting *Books* v. *City of Elkhart*, 235 F.3d 292, 299 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001)).

The basic disagreement among the courts of appeals centers on how to distinguish between mere psychological injuries resulting from the observation of conduct with which one disagrees, on the one hand, and additional injuries that could give rise to standing for Establishment Clause purposes, on the other. The stark facts of this case show that at least one crucial question is the nature of the plaintiff's asserted grievance (here, an ideological one). Thus, this case provides an opportunity to clarify the meaning of *Valley Forge* and the types of asserted injuries that do and do not give rise to standing in the Establishment Clause context. And the standing issue is particularly important here because respondent seeks to invalidate—and thus far has successfully emasculated—an Act of Congress seeking to remedy an Establishment Clause issue and prevent the destruction of a 70-year-old war memorial.

II. THE COURT OF APPEALS' EFFECTIVE INVALIDATION OF AN ACT OF CONGRESS WARRANTS REVIEW

On the merits, the court of appeals' decision warrants review for numerous reasons.

A. The Court Of Appeals Refused To Give Effect To An Act Of Congress And Required The Government To Tear Down A 70-Year-Old Memorial To Fallen Service Members

The court of appeals rendered invalid an Act of Congress by affirming the district court's permanent injunction barring the government "from implementing the provisions of Section 8121 of [the 2004 Act]." App., *infra*, 99a; see *id.* at 54a. Indeed, that injunction itself is based on the district court's conclusion "that the proposed transfer of the subject property to the VFW [mandated by the Act of Congress] is invalid." *Id.* at 98a. The invalidation of an Act of Congress is ordinarily a sufficient ground to warrant this Court's review, and the backhanded manner in which the Ninth

Circuit invalidated—by refusing to give effect to—the Act in this case calls for no different treatment.

Moreover, the court of appeals did not override just any Act of Congress. Instead, it refused to give effect to one that reflects Congress's considered judgment about how to balance competing interests in a particularly sensitive context. The federal government did not erect the cross. Instead, the VFW did so more than 70 years ago in a remote location as a memorial to fallen service members. App., *infra*, 56a. When Congress was faced with the district court's decision holding that the presence of the cross on federal land violated the Establishment Clause, it could have torn down the cross, but that could have been viewed as demonstrating hostility toward religion and dishonoring the memory of the service members who have long been memorialized on Sunrise Rock. Indeed, the district court found that it is undisputed that tearing down the cross "could lead to significant public opposition." *Id.* at 120a. Thus, Congress reasonably chose not to tear down the cross, but instead to transfer the land to the private, secular organization—the VFW—that had erected the memorial in the first place more than 70 years ago.

By divesting itself of the privately erected memorial, the government remedied any Establishment Clause issue in an eminently sensible manner. The Court has long held that the Establishment Clause does not require hostility toward religion (much less toward a longstanding memorial to fallen service members). *Van Orden*, 545 U.S. at 683-684 (plurality opinion); *id.* at 698-699, 704 (Breyer, J., concurring in the judgment); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Instead, the government has discretion to accommodate religion within the "play in the joints" between the Establishment and Free Exercise Clauses. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970); see *Cutter* v. *Wilkinson*,

544 U.S. 709, 719-720 (2005); cf. *International Soc'y for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."). Because the court of appeals' decision upsets Congress's judgment in this important and sensitive area, and requires the government to tear down a cross that has stood for more than 70 years as a memorial to fallen service members, this Court's review is warranted.[8]

B. The Court Of Appeals' Holding Conflicts With Holdings Of The Seventh Circuit

Because application of the Establishment Clause is intensely fact-dependent, see, *e.g.*, *McCreary County* v. *ACLU*, 545 U.S. 844, 867-868 (2005), the absence of a square circuit split would not detract from the need for this Court's review of the important constitutional question presented here. The court of appeals' decision does, however, "squarely contradict[]" decisions of the Seventh Circuit. App., *infra*, 41a (O'Scannlain, J., dissenting). That provides all the more reason for this Court's review.

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[8] As the dissenters from denial of rehearing explained, "there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." App., *infra*, 47a n.6. Whether the display of a cross on public land violates the Establishment Clause turns on a contextual inquiry that looks to many factors, including whether the cross, as is the case here, has been displayed for a long period in its current form without objection. See *Van Orden*, 545 U.S. at 701-703 (Breyer, J., concurring in the judgment). In any event, this petition does not present the question whether the display of a cross in connection with the war memorial at Sunrise Rock violates the Establishment Clause, but rather whether Congress's efforts to resolve any Establishment Clause problem by transferring the land to private hands may be given effect.

In stark contrast to the decision below, the Seventh Circuit has twice held that, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (2000); accord *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005). In *City of Marshfield*, a city accepted a statue of Jesus Christ as a gift and placed it in a public park. 203 F.3d at 489. After a suit was brought challenging the display of the statue as violating the Establishment Clause, the city sold 0.15 acres on which the statue stood to a private religious organization. *Id.* at 489-490. The court upheld the sale because the owner of land is presumably responsible for any expressive conduct on its property. *Id.* at 491. The "facial result" of transferring government property to private ownership, the court explained, is to transfer any challenged religious expression "from a public seller onto a private buyer." *Ibid.* Moreover, the land transfer "effectively ended state action" because there would be no "continuing and excessive involvement between the government and private citizens." *Id.* at 492.

Similarly, in *Mercier*, a private organization had obtained a city's permission to install on public land a monument inscribed with the Ten Commandments and other religious and secular symbols. 395 F.3d at 694-695. After an Establishment Clause suit was filed, the city sold the parcel of land on which the monument stood—a parcel that measured approximately 20 feet by 22 feet—to the private organization that had installed the monument. *Id.* at 697. As in *City of Marshfield*, the plaintiffs argued that "because the [city] knew that the sale would keep the monument in its challenged location, the sale itself favored the religious purpose of the monument, and thus that act was

unconstitutional." *Id.* at 702. And as in *City of Marshfield*, however, the Seventh Circuit upheld the sale because there were "no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." *Ibid.* See also *Utah Gospel Mission* v. *Salt Lake City Corp.*, 425 F.3d 1249, 1259-1260 (10th Cir. 2005) (holding that government cured First Amendment issue by selling land that had been public forum to church); *Paulson* v. *City of San Diego*, 262 F.3d 885 (9th Cir. 2001) (holding that sale of public land on which cross stood cured Establishment Clause issue), vacated on other grounds, 294 F.3d 1124 (9th Cir. 2002) (en banc) (holding that sale violated California Constitution), cert. denied, 538 U.S. 978 (2003).

The panel's original opinion candidly acknowledged the conflict by stating that, "[a]lthough the Seventh Circuit adopted a presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances,' we decline to adopt such presumption." App., *infra*, 25a n.13 (citation to *City of Marshfield* omitted). In response to the government's rehearing petition, the panel amended the opinion to state that, "to the extent that *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; accord *id.* at 76a-77a. As the dissenters from the denial of rehearing explained, the panel was correct in its initial opinion that its decision conflicts with decisions of the Seventh Circuit. *Id.* at 37a, 41a. None of the minor amendments to the opinion (see *id.* at 36a-37a) eliminate that conflict.[9]

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[9] The panel decision also departs from *City of Marshfield* concerning the proper remedy for any continuing endorsement of religion following a land transfer. The Seventh Circuit upheld the land transfer at issue in that case (which consisted of a portion of a public park), but reman-

C. The Court Of Appeals Failed To Accord Proper Respect To An Act Of Congress

The court of appeals rendered the Act of Congress invalid only by departing from well-settled interpretive principles. Because "there is a presumption of legitimacy accorded to the Government's official conduct," *NARA* v. *Favish*, 541 U.S. 157, 174 (2004), "the Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); see *McCreary*, 545 U.S. at 864. Of course, such deference is not limitless, *id.* at 864-865, but as the dissent observed, "Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it." App., *infra*, 44a (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Moreover, as this Court has repeatedly admonished, courts should read statutes to avoid constitutional difficulties, not to create them. *E.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

As Judge O'Scannlain observed, the court of appeals "flout[ed]" those fundamental principles by relying on insignificant considerations that the Seventh Circuit had correctly rejected and by misreading the relevant statutes in a way that introduced constitutional difficulties that do not actually exist. See App., *infra*, 45a; see also *id.* at 49a-53a

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ded for the district court to require additional measures, such as fencing and signs around the transferred land, that would inform a reasonable observer that the statute was on private land and was not endorsed by the government. See *City of Marshfield*, 203 F.3d at 497. Here, in contrast, the court of appeals simply invalidated the land transfer itself, instead of imposing conditions designed to avoid what the court viewed as a continuing endorsement of religion following the land transfer.

& nn.8, 10. Because the Ninth Circuit impugned the purpose of a co-equal Branch, and rendered an Act of Congress inoperative based on the court's unfair assessment of that purpose, this Court's review is warranted.[10]

1. The court of appeals levied the serious charge that Congress used the VFW as "a straw purchaser" to disguise the fact that the government would continue to control the war memorial. App., *infra*, 82a-83a. As the dissent observed, that is incorrect. *Id.* at 50a-51a. Indeed, as Judge O'Scannlain explained, "altogether missing in this case is *any* evidence that the government * * * will maintain or support the Sunrise Rock cross after the land transfer." *Id.* at 43a.

a. At the outset, the court of appeals criticized Congress's decision to transfer the memorial to the VFW, the organization that originally erected a cross on the site in 1934. App., *infra*, 81a-82a. "[H]ere again," as Judge O'Scannlain observed, the panel opinion "shrugs off the

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[10] The court of appeals also erred insofar as it framed the question presented as being whether Congress attempted to evade the district court's injunction and whether the land transfer mandated by Congress would be a "violation of the permanent injunction." App., *infra*, 75a (heading); see *id.* at 66a ("We agree that the exchange effectuated by § 8121 violates the injunction."). Indeed, the court even said that it was reviewing the district court's decision effectively invalidating an Act of Congress for abuse of the district court's (as opposed to Congress's) discretion. *Id.* at 65a, 66a. Congress's constitutional authority is not, however, subject to district courts' discretion, and the court of appeals identified no authority for that startling proposition. More fundamentally, the injunction could not divest Congress of its "authority to alter the prospective effect of previously entered injunctions." *Miller* v. *French*, 530 U.S. 327, 344 (2000). Nor could it divest Congress of its authority to legislate a remedy for any Establishment Clause violation. To the extent that the court of appeals believed that the previously issued injunction itself barred the Act of Congress at issue, its decision conflicts with decisions of this Court and warrants review.

conflicting holdings in *Marshfield* and *Mercier*." *Id.* at 51a n.10. In *Mercier*, for example, the Seventh Circuit upheld the sale to the organization that had donated the Ten Commandments monument to the City, in part because doing so "makes practical sense" and recognizes the group's "long-standing and important relationship with the Monument." 395 F.3d at 703; see *City of Marshfield*, 203 F.3d at 492. So too here, the VFW is "the logical purchaser," *Mercier*, 395 F.3d at 705, because it is the nonsectarian organization that erected the cross as a war memorial and its mission is perfectly consistent with the maintenance of a war memorial.

The court of appeals also observed that the land exchange was not initiated by an administrative agency through normal agency procedures, and instead was directed by Congress in an appropriations bill. App., *infra*, 81a-82a. But the land transfers in *Mercier* and *City of Marshfield* were not made through normal competitive-bidding processes either, and the Seventh Circuit expressly rejected the plaintiffs' reliance on that factor. *City of Marshfield*, 203 F.3d at 492; see *Mercier*, 395 F.3d at 696-697, 702. As Judge O'Scannlain explained, no precedent requires Congress to adhere to an agency's procedural rules or "disparag[es] a land transfer for having been enacted in an appropriations bill." App., *infra*, 51a. If anything, the fact that the land transfer was mandated in an Act of Congress should reinforce, not undermine, its validity. In any event, Congress required that the exchanged parcels of land have equal value or be equalized through a monetary payment. See 2004 Act § 8137(c) and (d), 117 Stat. 1100. That alone ensured that the government would receive "a fair market price for the land." *City of Marshfield*, 203 F.3d at 492.

b. The court of appeals also asserted that, if the VFW took down the cross, the land would automatically revert to

the United States. App., *infra*, 73a-74a, 80a. Not so. See *id.* at 39a (O'Scannlain, J., dissenting). Congress provided that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." 2004 Act § 8121(e), 117 Stat. 1100. While that provision calls for reversion if the VFW does not maintain "a war memorial," *ibid.*, it does not require the VFW to display a cross. The court of appeals correctly noted that the 2002 Act had designated the cross and surrounding land as a war memorial, App., *infra*, 73a, but the 2004 Act only requires the VFW to maintain "a" war memorial, not "the" war memorial that had been designated in the 2002 Act. See 2004 Act § 8121(e), 117 Stat. 1100. Indeed, nothing in the 2004 Act even mentions a cross, much less explicitly directs that VFW must display a cross.

As the dissent observed, the court of appeals' misinterpretation of the reversion clause underscores not only its error, but also the extent of its disagreement with the Seventh Circuit. App., *infra*, 43a n.4, 50a n.8. In *City of Marshfield*, the government similarly conditioned a sale of land on a restrictive covenant that required the property to be used for a specific purpose (a public park). 203 F.3d at 492-492. In contrast to the decision below, the Seventh Circuit considered the restrictive covenant irrelevant, in part because it is "relate[d] to the conduct of the parties following the sale of the property," not to the legitimacy of the transfer itself. *Id.* at 493.

c. The court of appeals also asserted that the 2004 Act grants the government "an easement or license over the subject property," App., *infra*, 79a, because it directs the Secretary to "continue to carry out [his] responsibilities * * * under [Section 8137 of the 2002 Act]." 2004 Act § 8121(a), 117 Stat. 1100. Section 8137, in turn, had di-

rected the Secretary, among other things, "to acquire a replica of the original memorial plaque and cross * * * and to install the plaque in a suitable location on the grounds of the memorial." 2002 Act § 8137(c), 115 Stat. 2279. Because the NPS can install a replica plaque before the land exchange is complete, that provision does not require any ongoing federal involvement in the memorial, much less control over the property. Moreover, the plaque would underscore the memorial's secular purpose by stating that the VFW erected the cross in memory of fallen service members. See, *e.g.*, *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in the judgment).[11]

As Judge O'Scannlain correctly observed, the panel also erred in concluding that the NPS would retain general management authority over the property even after the land is transferred to private ownership. App., *infra*, 49a. The panel relied on statutes that govern the management of federal, not private, land. See, *e.g.*, 16 U.S.C. 1 (stating that the NPS "shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations"). In that respect as well, the panel misconstrued statutes to create constitutional difficulties that do not actually exist.

2. The court of appeals also objected that "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with [a] cross atop it—will do nothing to minimize the impermissible governmental endorsement." App., *infra*, 85a. But the land within the Preserve

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[11] While the 2002 Act required NPS to acquire replicas of the cross and plaque, it required NPS to install only the replica plaque, not the cross, at Sunrise Rock. § 8137(c), 115 Stat. 2278. Thus, the provision concerning a replica cross is not relevant to the question presented here. In any event, NPS does not intend to acquire a replica cross, much less to install it at Sunrise Rock. 05-55852 Gov't C.A. Br. 39.

is not entirely federal—approximately 10% is not federally owned, including 86,000 privately owned acres. *Id.* at 55a. Indeed, two private ranches and several corrals are within two miles of the cross. 03-55032 C.A. E.R. 34. And in the American West, it is not unusual for private land to be intermingled with public land. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2593 (2007); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672, 677-678 (1979). Under the congressionally mandated land transfer, therefore, Sunrise Rock would be better described as one of many holes in a vast slice of Swiss cheese, not as a tiny donut hole. Even respondent, who worked as an Assistant Superintendent at the Preserve, testified that when he first saw the cross, he did not know whether it was on federal land. 03-55032 C.A. E.R. 53, 54. Instead, respondent explained that, "[e]xcept in those few instances where there are houses or structures, you don't know whether the lands are not federally owned or federally owned." *Id.* at 53. In this respect as well, the court of appeals improperly stretched to invalidate an Act of Congress.[12]

3. The court of appeals panel also erred in relying on what it viewed as "the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock." App., *infra*, 83a. In its earlier decision in this case, the court of appeals held that the government's past efforts to preserve the cross *on federal land* violated the Establishment Clause. But as Judge O'Scannlain observed, the question here is not whether there had been a violation; instead, it is whether the government can prospectively cure any violation through a land exchange. *Id.* at 52a. Pointing to

[12] At a minimum, the court of appeals erred in invalidating the Act of Congress and land transfer altogether, as opposed to requiring (if necessary) that the replica plaque or some other sign make clear that the memorial is located on private land. See p. 23 note 9, *supra*.

past conduct does not answer that question and does not diminish the conflict with the Seventh Circuit's decisions recognizing that "a sale of real property is an effective way for a public body *to end its inappropriate endorsement of religion.*" *City of Marshfield*, 203 F.3d at 491 (emphasis added); accord *Mercier*, 395 F.3d at 701.

Nonetheless, the court of appeals asserted that in the *prior* appeal concerning the legality of the cross's presence on *federal* land, the court had "necessarily already considered th[e] question" "whether the improper governmental endorsement of religion has ceased." App., *infra*, 84a. In the court's view, the prior opinion determined that the cross at Sunrise Rock endorsed religion. *Ibid.* As Judge O'Scannlain observed, however, that is "nothing short of a judicial 'bait-and-switch,'" because the court of appeals' prior opinion relied on the cross's presence on federal land and expressly reserved the question presented here. *Id.* at 53a; see *id.* at 104a. In any event, the court of appeals thereby made clear that its decision did not ultimately turn on the contextual issues discussed above, but instead turned on the court's view that a land transfer is not a valid means of curing an Establishment Clause violation. Thus, as the dissent explained, the decision below effectively "announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering the sale of the land upon which a religious symbol previously was situated," and thereby "recklessly splits from the Seventh Circuit and announces a broad and unprecedented rule that should not be allowed to stand." *Id.* at 37a, 46a.

* * * * *

The upshot is that the Ninth Circuit, in conflict with the Seventh Circuit, and over a five-judge dissent from denial of rehearing en banc, rendered an Act of Congress invalid and required the government to tear down a cross that has

stood without incident for 70 years as a memorial to fallen service members. That seriously misguided decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO, PLAINTIFF-APPELLEE

v.

DIRK KEMPTHORNE,* SECRETARY OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; JONATHAN B. JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; DENNIS SCHRAMM, SUPERINTENDENT, MOJAVE NATIONAL PRESERVE, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

Argued and Submitted: Apr. 9, 2007
Filed: Sept. 6, 2007

Before: B. FLETCHER AND M. MARGARET MCKEOWN, Circuit Judges, and RONALD M. WHYTE,** District Judge.

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* Dick Kempthorne is substituted for his predecessor Gail Norton as Secretary of the Department of the Interior. Dennis Schramm is substituted for his predecessor Mary Martin as the Superintendent of the Mojave National Preserve. See Fed. R. App. P. 43(c)(2).

** The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

MCKEOWN, Circuit Judge

A Latin cross sits atop a prominent rock outcropping known as "Sunrise Rock" in the Mojave National Preserve ("Preserve"). Our court previously held that the presence of the cross in the Preserve—which consists of more than 90 percent federally-owned land, including the land where the cross is situated—violates the Establishment Clause of the United States Constitution. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). We affirmed the district court's judgment permanently enjoining the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

During the pendency of the first appeal, Congress enacted a statute directing that the land on which the cross is situated be transferred to a private organization in exchange for a parcel of privately-owned land located elsewhere in the Preserve. *See* Pub. L. No. 108—87, R. 12.1, 12.4 § 8121(a)-(f), 117 Stat. 1100 (2003). That land exchange is already in progress and would leave a little donut hole of land with a cross in the midst of a vast federal preserve. The issue we address today is whether the land exchange violates the district court's permanent injunction. We conclude that it does, and affirm the district court's order permanently enjoining the government from effectuating the land exchange and ordering the government to comply with the original injunction.

BACKGROUND[1]

I. THE MOJAVE NATIONAL PRESERVE

The Preserve encompasses approximately 1.6 million acres, or 2,500 square miles, of primarily federally-owned land in the Mojave Desert, located in Southeastern California. In 1994, the Bureau of Land Management ("BLM") transferred the land to the National Park Service ("NPS"); both the BLM and the NPS are federal agencies under the Department of the Interior ("DOI"). Within the Preserve, approximately 86,000 acres of land are privately owned and 43,000 acres belong to the State of California. Thus, slightly more than 90 percent of the land in the Preserve is federally owned. The Preserve is a "unit of the National Park System" and is given "statutory protection as a national preserve." 16 U.S.C. § 410*aaa*—41, 410*aaa*—42; *id.* § 1(c). The Preserve is under NPS jurisdiction and authority. *Id.* § 410*aaa*—46.

II. THE CROSS

The current incarnation of the cross atop Sunrise Rock is between five and eight feet tall and is constructed out of four-inch diameter metal pipes painted white. It is a Latin cross, meaning that it has two arms, one horizontal and one vertical, at right angles to one another. It is undisputed that "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I*, 212 F. Supp. 2d at 1205.

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[1] Further background detail is found in the district court's order and our prior opinion on the merits of the Establishment Clause challenge. *See generally Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) ("*Buono I*"); *Buono*, 371 F.3d 543 (9th Cir. 2004) ("*Buono II*").

Historic records reflect that a wooden cross was built on that location as early as 1934 by the Veterans of Foreign Wars ("VFW") as a memorial to veterans who died in World War I. Photographs depict the wooden cross and signs near it stating: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884." The wooden signs are no longer present, and the original wooden cross, which is no longer standing, has been replaced by private parties several times since 1934. The cross has been an intermittent gathering place for Easter religious services since as early as 1935, and regularly since 1984.

The current version of the cross was built by Henry Sandoz, a local resident, sometime in 1998. When NPS investigated the history of the cross, Sandoz explained that he drilled holes into Sunrise Rock to bolt the cross in place, making it difficult to remove. Sandoz did not receive a permit from NPS to construct the cross.

Following *Buono I*'s injunction against display of the cross, the cross has been covered by a plywood box. When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to act as a memorial for war veterans.

III. Litigation over the Cross and the Congressional Response

The current controversy surrounding the cross surfaced in 1999, when NPS received a request from an individual seeking to build a "stupa" (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead

located near the cross. NPS denied that request, citing 36 C.F.R. § 2.62(a)[2] as prohibiting the installation of a memorial without authorization. A hand-written note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest." The letter also indicates that "[c]urrently there is a cross on [a] rock outcrop located on National Park Service lands. . . . It is our intention to have the cross removed."

In 1999, NPS undertook a study of the history of the cross. NPS determined that neither the cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, NPS recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Following the announcement by NPS of its intention to remove the cross, the United States Congress passed a series of laws, described below, to preserve the Sunrise Rock cross. The first piece of legislation, enacted in December 2000, provided that no government funds could be used to remove the cross. *See* Pub. L. No. 106—554 § 133, 114 Stat. 2763A—230 (2000) (hereafter "§ 133").[3]

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[2] The regulation provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." 36 C.F.R. § 2.62(a).

[3] "None of the funds in this or any other Act may be used by the Secretary of the Interior to remove *the five-foot-tall white cross* located

A. *BUONO I*

Frank Buono[4] filed suit in March 2001 against the Secretary of the DOI, the Regional Director of NPS, and the Superintendent of the Preserve (collectively, "NPS" or "Defendants"). The district court concluded that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono I*, 212 F. Supp. 2d at 1215-17. In July 2002, the court entered a permanent injunction ordering that the "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[5]

B. DESIGNATION OF THE CROSS AS A NATIONAL MEMORIAL

In January 2002, while this matter was pending in district court, Congress passed a defense appropriations bill, which included a section designating the Sunrise

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within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15." § 113 (emphasis added).

[4] Buono is a retired NPS employee who worked for the agency from 1972 to 1997. From September 1994 to December 1995, Buono worked as the Assistant Superintendent of the Preserve.

[5] We granted the government's motion to stay the injunction pending appeal, insofar as the injunction required NPS to immediately remove or dismantle the cross. The stay did not apply to any "alternative methods" for complying with, or additional obligations imposed by, the district court's order. *See Buono II*, 371 F.3d at 545 n.1 (discussing stay orders). During the appeal, NPS covered the cross, first with a large tarpaulin and later with a plywood box, which the government asserts will remain in place pending resolution of this action.

Rock cross as a "national memorial." *See* Pub. L. No. 107—117 § 8137, 115 Stat. 2278-79 (2002), *codified at* 16 U.S.C. § 410*aaa*—56 (note) (hereafter "§ 8137"). That section provides:

> (a) DESIGNATION OF NATIONAL MEMORIAL. —*The five-foot-tall white cross* first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, *is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.*
>
> (b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.
>
> (c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than *$10,000 of funds* available for the administration of the Mojave National Preserve to *acquire a replica of the original memorial plaque and cross placed at the national World War I memorial* designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Id. (emphases added). The cross is designated the "White Cross World War I Memorial." 16 U.S.C. § 431 (note).

NPS is statutorily charged with "the supervision, management, and control of the several national parks and national monuments." 16 U.S.C. § 2. National "memorials" fall within the broader category of national "monuments." *See* 16 U.S.C. § 431 (note) (identifying recognized national monuments, including various categories of "national monuments" and "national memorials").

In October 2002, less than three months after the district court's injunction, in legislation aimed at the Sunrise Rock cross, Congress passed a defense appropriations bill that included a provision barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I." Pub. L. No. 107—248 § 8065(b), 116 Stat. 1551 (2002) (hereafter "§ 8065").

C. *BUONO II* AND PASSAGE OF § 8121

The government appealed the district court's order and injunction. In September 2003, one month after oral argument before a panel of our court but before a decision issued, Congress enacted another defense appropriations bill that included a land exchange agreement regarding the Sunrise Rock cross. *See* Pub. L. No. 108—87 § 8121(a)-(f), 117 Stat. 1100 (2003), *codified at* 16 U.S.C. § 410*aaa*—56 (note), (hereafter "§ 8121"). The statute provides:

(a) EXCHANGE REQUIRED.—*In exchange for the private property described in subsection (b),* the Secretary of the Interior *shall convey* to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post # 385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to *a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated* (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107—117; 115 Stat. 2278)) *as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.* Notwithstanding the conveyance of the property under this subsection, *the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.*

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569—051—44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

§ 8121(a)-(b) (emphases added). The government retains a reversionary interest in the property as follows:

(e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition

> that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. *If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.*

§ 8121(e) (emphasis added). The cross-reference in § 8121(a) to § 8137 pertains to use of federal funds to acquire a replica cross and plaque. *See* § 8197(c). The land transfer was under-way when the district court enjoined its enforcement, as described below.

In June 2004, in affirming the district court's permanent injunction, we held that the presence of the cross in the Preserve violates the Establishment Clause, agreeing with the district court that this case is "squarely controlled" by *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) ("*SCSC*"). *Buono II*, 371 F.3d at 548. In *SCSC*, we reasoned that the presence of a cross on city land, even where it bore a plaque dedicating the cross as a war memorial to veterans, 93 F.3d at 618, violated the Establishment Clause because "the presence of the cross may reasonably be perceived as governmental endorsement of Christianity." *Id.* at 620.

The government's several attempts to distinguish *SCSC* were not persuasive. For example, we held that it was "of no moment" that the cross in *SCSC* was significantly taller, located in an urban area, or illuminated during certain holidays:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above

> grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement . . . . Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

Buono II, 371 F.3d at 549-50 (emphasis added).

We also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, *would believe—or at least suspect*—that the cross rests on public land because of the vast size of the Preserve, more than 90 percent of which *is* federally owned. *Id.* at 550 (citing reasonable observer test set forth in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). A reasonably informed observer aware of the history of the Sunrise Rock cross would know not only that the cross was erected by private individuals (which the government argued favored its view), but also that Congress has taken various measures to preserve the cross, i.e., designating it a war memorial, prohibiting use of federal funds to remove it, and denying similar access for a Buddhist shrine. *Id.*

Acknowledging the passage of § 8121 while the appeal was pending, we addressed the government's challenge that § 8121 rendered the appeal moot or would soon do so. We rejected the government's mootness challenge for two reasons: First, we held that the case was not moot because the land transfer had not yet taken effect. *Id.* at 545. Second, because "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case," we held that *even if* the land transfer had taken effect, the government still had not carried its heavy burden to show mootness. *Id.* at 546. Even if the land were transferred under § 8121(a), it *may revert* to the government under § 8121(e), or as provided in other statutes. In particular, we noted that 16 U.S.C. § 431 authorizes relinquishment of lands containing "national monuments" to the federal government, and 16 U.S.C. § 410*aaa*--56 authorizes the Department of the Interior to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange." *Id.* at 546 (discussing § 8121, 16 U.S.C. §§ 431, 410*aaa*—56).

D. *BUONO III*

Despite the injunction against display of the cross in the Preserve, the government began moving forward with the mechanics of the land exchange under § 8121. Buono then moved to enforce the district court's prior injunction, or modify it to prohibit the land exchange as a violation of the Establishment Clause. In April 2005, the district court granted Buono's motion to enforce the injunction, and denied as moot the request to amend the permanent injunction. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1177, 1182 & n.8 (C.D. Cal. 2005) ("*Buono III* "). According to the district court, "the transfer of

the Preserve land containing the Latin Cross which as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1182 (citation and quotation marks omitted). The district court deemed the exchange "invalid" and permanently enjoined the government "from implementing the provisions of Section 8121 of Public Law 108—87" and ordered the government "to comply forthwith with the judgment and permanent injunction entered by th[e] court on July 24, 2002." *Id.* It is that decision that the government now appeals.

STANDARD OF REVIEW

We review for abuse of discretion the district court's order enforcing its prior injunction. *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002). A district court abuses its discretion in this regard if "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.*

ANALYSIS

In the district court, Buono advanced two alternative arguments challenging the land exchange under § 8121. First, Buono argued that the land exchange is an attempt to evade the permanent injunction. Alternatively, he argued that the land exchange itself violates the Establishment Clause because it is an improper governmental endorsement of religion. The district court's holding is grounded only on the first basis, i.e., that the land exchange is a sham transaction with the purpose of permitting continued display of the cross in violation of

the permanent injunction. On appeal, the government contends that § 8121 was a bona fide attempt by Congress to comply with the injunction. The government also argues that because it was not given the opportunity to fully effectuate the transfer, there are unknown facts that render this controversy "unripe" for judicial review.

Turning first to the government's ripeness challenge, we conclude that this controversy is ripe for review. As to the second question, the district court did not abuse its discretion in enforcing the injunction. We agree that the exchange effectuated by § 8121 violates the injunction, which prohibits the display of the Latin cross because it runs afoul of the Establishment Clause.

I. RIPENESS

Ripeness is a justiciability requirement that seeks to avoid premature litigation of disputes. *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 579-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) ("[R]ipeness is peculiarly a question of timing.") (citations omitted). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993); *accord Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-42 (9th Cir. 2000) (en banc) (discussing constitutional and prudential components of ripeness). The ripeness question we address is whether it is premature to consider a violation of the injunction before completion of the land exchange.

A. Constitutional Component of Ripeness

The constitutional component of ripeness—that there be an Article III "case or controversy"—requires a concrete impact upon the parties arising from the dispute. *Union Carbide*, 473 U.S. at 579, 105 S. Ct. 3325. This analysis is similar to the injury-in-fact inquiry under the standing doctrine. *See Anchorage Equal Rights Comm'n*, 220 F.3d at 1138-39.

The government argues that before litigation proceeds, it should be given an opportunity to try to execute the land exchange in compliance with the prior injunction and the government's constitutional obligations. Buono responds that the "concrete" injury ripe for review is that the land transaction's very structure evidences its lack of a secular purpose and its effect continues the government's improper endorsement of religion that we already held exists.

This case can best be described as an ongoing controversy about the cross, the specifics of which shift with successive congressional enactments. The controversy is neither premature nor will it go away on its own. Given the specifics of § 8121, it is no answer to say that the land exchange is not complete. It is, as the district court notes, "already in progress," and the government intends to complete it. *Buono III*, 364 F. Supp. 2d at 1178. Buono's challenge to the present terms of the exchange is not a "hypothetical request[ ] for an advisory opinion." *Anchorage Equal Rights Comm'n*, 220 F.3d at 1141.

The Supreme Court has held that pre-enforcement review of a statute is appropriate where the governmental purpose in enacting the statute evidences an improper endorsement of religion in violation of the Estab-

lishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). It is no legal leap to conclude that pre-enforcement review is similarly appropriate where the purpose of a statute is to evade an injunction intended to end an ongoing Establishment Clause violation.

In *Santa Fe*, the Supreme Court considered the ripeness of a facial challenge to a school district's policy purportedly allowing school prayer. *Id.* The policy permitted students (a) to vote on whether there should be a student-delivered invocation given at the start of high school football games, and (b) to later vote to select the one student who would deliver the invocation at all games throughout the year. *Id.* at 297-98, 120 S. Ct. 2266. The school district argued that it was premature to review the policy because there "can be no certainty that any of the statements or invocations will be religious." *Id.* at 313, 120 S. Ct. 2266. Rejecting that challenge, the Court concluded that while forcing a student "to participate in religious worship" was a serious constitutional injury, so too was the "mere passage by [the school district] of a policy that has the purpose and perception of government establishment of religion . . . . [and] the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote." *Id.* at 313-14, 120 S. Ct. 2266 (recognizing that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.' ") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring)). Thus, the mere enactment of the policy, particularly in light of the school district's conduct, was a sufficient constitutional injury to warrant pre-enforcement review, and ultimately an

injunction against implementation of the policy. *Id.* at 316.[6] Importantly, in analyzing ripeness, the Court looked to the history of the school district's conduct in enacting the policy and the true purpose of the policy. *Id.* at 314-15.

The analogy to *Santa Fe* is apt. Here, both the district court and this court have concluded that a grave constitutional injury *already exists*. The permitting display of the Sunrise Rock cross in the Preserve is an impermissible governmental endorsement of religion. *See Buono II*, 371 F.3d at 548-50. As discussed further below, the constitutional injury will persist after—and as a result of—the land exchange effectuated under § 8121. This is so because (among other things) § 8121 and other applicable statutes[7] permit the government's significant *ongoing control* of and involvement with the cross and the property on which it is situated. *See Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266 (concluding that

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[6] Our cases have similarly held that passage of a statute and putting it into effect (even if the effect is not complete) gives rise to a dispute ripe for judicial review. In *Saint Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983), a church-run hospital challenged the National Labor Relations Board's jurisdiction over it as a violation of the Establishment Clause. *Id.* at 1440. Congress had amended the National Labor Relations Act expressly conferring jurisdiction over nonprofit hospitals without excepting those run by religious institutions. We concluded that the question of NLRB's jurisdiction was ripe for review. *Id.* In *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of the State of Montana*, 792 F.2d 782 (9th Cir. 1986), we held that the claim of Indian tribes challenging the validity of a cooperative agreement regarding agency jurisdiction to advise the tribes about oil and gas rights was sufficiently ripe where the final cooperative agreement had been placed into operation by the agreeing agencies. *Id.* at 788-89.

[7] *See* § 8137(a)-(c), 16 U.S.C. §§ 431, 410*aaa*—56.

the text of the school district's policy alone reveals the extent of school involvement in the election of the student speaker and the content of the message to be delivered). And, the government's repeated actions in preserving the cross (and forestalling enforcement of the injunction) further evidence its goal of keeping the cross in place, *see* §§ 133, 8137, 8056(b), 8121, just as the school district in *Santa Fe* acted with the purpose of maintaining a school policy permitting prayer at school events. *Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266.[8]

Buono has alleged a sufficient constitutional injury to overcome any argument that his challenge to § 8121 is unripe. *See Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266. The challenge in this case presents a concrete injury, rather than an "imaginary" or "speculative" one.[9]

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[8] The various governmental actions are discussed in further detail *infra* § II.A.3.

[9] The government can hardly rely, as a predicate for a ripeness challenge, on its attempt to temporarily comply with the permanent injunction by covering the cross with a wooden box. If that were the final compliance mechanism, the district court could determine whether it is sufficient. Significantly, however, the government is proceeding with the land exchange. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*,—U.S.—, 127 S. Ct. 2738, 2751, 168 L. Ed. 2d 508 (2007) (holding that school district's voluntary cessation of use of racial tiebreaker pending outcome of litigation did not negate Article III standing of plaintiff group members challenging policy, as the school continued to vigorously defend the policy in court); *Friends of Earth, Inc. v. Laidlaw Envt'l Svcs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that voluntary cessation of wrongful conduct, either by defendant's achievement of substantial compliance with its permit requirements or its shutdown of offending facility, did not moot controversy over defendant's compliance with Clean Water Act because the offending conduct had not permanently ceased).

B. Prudential Component of Ripeness

Even where a concrete case or controversy is present, we consider whether, because of prudential concerns, we should decline to exercise jurisdiction. *See Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325; *Anchorage Equal Rights Comm'n*, 220 F.3d at 1141. We evaluate two interrelated factors: (a) the hardship that the party seeking relief will suffer from withholding judicial action, and (b) the fitness of the issues in the record for judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

This case easily satisfies both prudential components. As to the harm, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325 (internal quotations and citations omitted).[10] The hardship resulting from the continuation of an Establishment Clause violation enjoined by the court is sufficient.

A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994) (citations omitted). These requirements are satisfied here.

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[10] Unlike in *Anchorage Equal Rights Comm'n*, where the plaintiffs sought review of a housing law "in a vacuum and in the absence of any particular victims of discrimination," 220 F.3d at 1142, in this case there is a concrete victim—Buono—and the statutes are not being analyzed in a vacuum. *See, e.g., Buono III*, 364 F. Supp. 2d at 1181-82 (discussing history of government's preservation efforts regarding the cross).

The key issue is primarily a question of law, i.e., whether the land exchange under § 8121 violates the district court's order permanently enjoining the government from permitting display of the cross in the Preserve. *See, e.g., Santa Fe,* 530 U.S. at 314, 120 S. Ct. 2266 (permitting facial challenge to school district's policy prior to enforcement of the policy based largely on the Court's ability to construe the constitutionality of the policy's purpose as a legal matter); *Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325 (granting pre-enforcement review of constitutionality of administrative scheme requiring registrants to participate in binding arbitration of disputes with limited judicial review because party's challenge raised solely legal issues).

Next, we assess the state of the factual record, an inquiry that overlaps with (and in this case collapses into) the third component, the finality of the decision. *Friedman Bros. Inv. Co. v. Lewis,* 676 F.2d 1317, 1319 (9th Cir. 1982). The government argues that the record is incomplete because certain factual scenarios, as yet unknown, could occur at some time in the future. The government illustrates its claim by positing two potential scenarios that may occur rendering decision on this appeal premature. Upon examination, neither proposed scenario persuades us that we should delay decision in this matter.

First, the government argues that once the land exchange is complete the VFW *might* at some point in the future *remove* the cross, but continue to maintain the property as a "war memorial" as provided under § 8121. Thus, according to the government, the court should not decide whether the injunction is violated unless and until the land exchange is complete and the VFW has an

opportunity to decide whether to maintain or remove the cross.

Under the government's construction, the dispute would never be ripe because, even if the transfer occurred, the government or the VFW could always argue that removal of the cross could occur at some point in the future. Such gamesmanship is not sanctioned by our prudential ripeness doctrine.

The government's view is also at odds with two statutes related to the Sunrise Rock cross, which, when read together, demonstrate that the VFW cannot remove the cross without forfeiting the property to the government. Section 8137(a) designates "*the five-foot-tall white cross*" . . . as a "national memorial." § 8137(a) (emphasis added); *see also* § 8137(b) (referring to "[t]he memorial cross"); 16 U.S.C. § 431 (note) (listing "national memorial" titled "White Cross World War I Memorial"). In other words, the cross itself is the memorial. Section 8121(e) conditions transfer of the land on the VFW's agreement to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8121(e). Section 8121(e) further provides that if "the conveyed property is no longer being maintained as a war memorial, the property *shall revert* to the ownership of the United States." *Id.* (emphasis added). Under these two statutes, the VFW's removal of the cross from Sunrise Rock would trigger the reversionary clause of § 8121(e) and the land would revert to the United States. Nothing permits the VFW to destroy a national memorial, remove the cross, and erect a substitute memorial. The entire scheme is directed to preservation of the cross.

To suggest that we do not yet know enough facts to decide this dispute ignores the practical reality of these statutory mandates. In *Santa Fe,* the Court rejected the school district's similarly implausible explanations for its conduct, based on the history and context of the school district's actions:

> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose,* and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Santa Fe, 530 U.S. at 315, 120 S. Ct. 2266 (emphasis added).

The government also argues that DOI might never exercise the reversionary clause, even if the cross is removed. Again, this argument fails as § 8121(e) itself provides that the property "shall revert" if the property is no longer maintained as a "war memorial," i.e., *the cross* under § 8137. Countenancing this argument would also render the claim perpetually unripe, bringing to mind the Rule Against Perpetuities. Although the rule surely does not apply in this context, common sense should.

Even though the transfer itself is not complete, the certainty of the governmental action taking place is suf-

ficiently ripe to allow review. *See, e.g., Friedman,* 676 F.2d at 1318-19 (concluding that challenge to agency's action as violating National Environmental Policy Act was ripe where agency had granted funds for project and exempted it from certain of NEPA's requirements, despite that formal action to acquire the subject property by condemnation had not yet commenced). Thus, none of the prudential ripeness concerns weigh against our rendering a decision.[11]

II. VIOLATION OF THE PERMANENT INJUNCTION

We next address whether the district court abused its discretion in concluding that "transfer of the Preserve land containing the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious mes-

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[11] The government raises, for the first time on appeal, a second challenge under the guise of "ripeness." It argues that the district court exceeded its power by issuing a second injunction in the face the government's effort to comply with the original injunction. This is not a true ripeness consideration, but a challenge to the propriety of the district court's exercise of its equitable power to enforce its prior injunction. Because this issue is not one of justiciability or jurisdiction, the government waived the argument by failing to challenge the scope of the district court's action before that court. *See, e.g., Ritchie v. United States,* 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised). Even assuming no waiver, the district court acted within its broad equitable powers to enforce its prior injunction. *See, e.g., Ellis v. City of La Mesa,* 990 F.2d 1518, 1530-31 (9th Cir. 1993) (per curiam) (noting, in dispute over religious symbols on public land, that in light of changed circumstances of ownership of land (or a planned change in ownership), district court has broad equitable powers "to modify, fashion or enforce appropriate equitable relief" in assessing compliance with its prior injunction).

sage and creates an appearance of honoring only those servicemen of that particular religion' . . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock." *Buono III*, 364 F. Supp. 2d at 1182 (citation omitted).

A. Government Action

In *Buono II*, we noted that "the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause." *Buono II*, 371 F.3d at 546 (citing *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000)).[12] But we left for another day the question of "whether a transfer completed under section 8121 would pass constitutional muster." *Id.* In considering that question, we examine both the form and substance of the transaction to determine

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[12] In *Marshfield*, it was undisputed that a white, marble, fifteen-foot statue of Jesus Christ situated on city park land violated the Establishment Clause. *Id.* at 489. To remedy the violation, the city sold the statue and a small parcel of land (0.15 acres) beneath the statute to a private organization that agreed to maintain the land and the statue, including paying for the electrical service used to light the statue. *Id.* at 490. After concluding that the sale properly ended the government action with respect to the statue and the property, the court determined that the statue's presence still violated the Establishment Clause. *Id.* at 495. Based on the historic association of the land with the public park, the dedication of the land to use as a public park through a restrictive covenant, and the physical location and visual perception of the now-private property within the public park, the court concluded that a reasonable observer would perceive that the statue was on city park property and that it "constitute[d] a City endorsement of religion." *Id.* at 495-96.

whether the government action endorsing religion has actually ceased. *See Marshfield*, 203 F.3d at 491.[13]

As did the district court, based on the circumstances of this case, we consider three aspects of the land exchange under § 8121: (1) the government's continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government's efforts to preserve the cross.

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[13] Although the Seventh Circuit adopted a presumption that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion" in the absence of "unusual circumstances," *Marshfield*, 203 F.3d at 491, we decline to adopt such presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area. *Compare McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 884-85, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (holding unconstitutional postings of Ten Commandments at county courthouses on the basis that counties' purpose in erecting displays demonstrated impermissible governmental endorsement of religion), *with Van Orden v. Perry*, 545 U.S. 677, 700, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (upholding "passive monument" inscribed with Ten Commandments on Texas State Capitol grounds based on analysis of monument's and nation's history) (Rehnquist, C.J.) (plurality opinion). *See also Van Orden*, 545 U.S. at 685 nn.4 & 5, 125 S. Ct. 2854 (citing cases under the Establishment Clause over the preceding 25 years of Supreme Court jurisprudence). Moreover, the "public function" cases discussed in *Marshfield* suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands. *Evans v. Newton*, 382 U.S. 296, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) ("[W]here the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."); *Terry v. Adams*, 345 U.S. 461, 469, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (lack of formal public control over election primary "immaterial" to analysis of constitutional violation).

1. Continuing Government Oversight and Control Over the Cross and Preserve Property

Although Congress sought to transfer the property to the VFW, a private entity, the various statutes, when read as a package, evince continuing government control. The following summary highlights that control:

- NPS retains overall management and supervision of the Preserve.
- NPS is responsible for "the supervision, management, and control" of national memorials.
- The "five-foot-tall white cross" in the Mojave National Preserve is designated as a "national memorial."
- The transfer of land to the VFW is conditioned on the VFW's maintenance of the conveyed property as a memorial to World War I veterans.
- The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque.
- The property "shall revert" to government ownership if "it is no longer being maintained as a war memorial."

The government retains various rights of control over the cross and the property. NPS is granted statutory powers of "supervision, management, and control" of national memorials. *See* 16 U.S.C. §§ 2, 431. Thus, NPS's general supervisory and managerial responsibilities with respect to the cross remain, despite a land

transfer. *See, e.g.*, 16 U.S.C. § 1 (providing that the newly created NPS is responsible for regulating and promoting "national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose" of conservation); 16 U.S.C. § 3 ("The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of [NPS].").[14]

In addition, § 8121(a) expressly reserves NPS's management responsibilities under § 8137. *See* § 8121(a) ("Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137."). Section 8137 not only designates the cross a national memorial, but provides for $10,000 in funds for NPS to acquire and install replicas of the original plaque and cross located at the site. *See* § 8137(a)-(c). The district court found that these provisions gave the government an easement or license over the subject property for this particular purpose. *Buono III*, 364 F. Supp. 2d at 1180. Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements on that land. *See, e.g., First Unitarian Church of Salt Lake v. Salt Lake*, 308 F.3d 1114, 1122 (10th Cir. 2002) (holding that where the government sells land to a private religious organization but maintains a pedestrian easement on the land, the First

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[14] The government does not dispute that the Preserve is under NPS's jurisdiction as a unit of the national park system. *See* 16 U.S.C. §§ 1(c), 410*aaa*—41, 410*aaa*—42, 410aaa—46.

Amendment speech clause applies even though the private party holds title to the land).

The district court also focused on the significance of the government's retention of a reversionary interest in the property under § 8121(e). *See Hampton v. City of Jacksonville*, 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that the inclusion of a reversionary clause in deeds to segregated golf courses conveyed by the city to private parties was sufficient state action to bring the golf courses within the Fourteenth Amendment because the reversionary clauses allowed the city to exercise "complete present control" over the golf courses); *Eaton v. Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964) (holding that a reverter clause in a deed of trust allowed the city to effectively exercise control of the facility to ensure that it was always used "as a hospital," and that such ongoing city control over use of property constituted sufficient state action to subject the hospital to the Fourteenth Amendment's prohibitions against racial discrimination). As in *Hampton* and *Eaton*, the reversionary clause in § 8121(e) results in ongoing government control over the subject property, even after the transfer.

Although the government argues that reversionary interests are run-of-the mill clauses in contracts with the government, the commonality of such clauses does not diminish their power or effect. The fact remains that the government has an *automatic* reversionary interest in the property if it determines that the property is no longer being used as a "war memorial," which, at this juncture, is the cross itself. *See* § 8137. *See also Buono II*, 371 F.3d at 546 (noting the importance of the government's reversionary interest, and various other mechanisms by which the government can acquire public

lands, in concluding that the dispute had not been rendered moot by passage of § 8121).

As it did with respect to ripeness, the government argues that the court must await exercise of the reversionary interest before determining whether it is a real factor in government control over the property. We reiterate the import of the reversionary interest; it shows the government's ongoing control over the property and that the parties will conduct themselves in the shadow of that control. The courts in *Hampton* and *Eaton* found dispositive the ongoing control resulting from the reversionary interest; their analysis is persuasive here.

Based on the government's ongoing supervisory, maintenance and oversight responsibilities with respect to the cross and the property, coupled with the reversionary interest, the district court found that the government retains important property rights in, and "will continue to exercise substantial control over," the property on which Sunrise Rock is located, even after the land exchange. *Id.* at 1179. The government has failed to show that this determination is either clearly erroneous or an abuse of discretion.

2. METHOD FOR EFFECTUATING THE LAND EXCHANGE

Next, we examine the method of sale by which § 8121 transfers the property to a private buyer outside the normal NPS procedures for transfer of parklands. The Secretary of DOI is authorized to exchange federal land for non-federal land under its jurisdiction. *See* 16 U.S.C. § 460*l*—22(b); *see also* § 410*aaa*—56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange"). In this case, however, the

decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting such exchange. *E.g.*, *id.* § 460l—22(b) (providing that upon request, "prior to such exchange the Secretary . . . shall hold a public hearing in the area where the lands to be exchanged are located"). Nor did the government open bidding to the general public. *E.g.*, *id.* § 460*l*—22(a). Rather, § 8121 directs that the land be transferred to the VFW, the organization that originally installed a cross on Sunrise Rock some years ago and desires the continued presence of the current cross in the Preserve. The private land being exchanged for the federal property is owned by the Sandozes, who constructed the present cross and who have actively sought to keep the cross on Sunrise Rock. *Buono III*, 364 F. Supp. 2d at 1180.

The government argues that, of all parties, the VFW is the "logical purchaser" because it originally erected the cross at the site more than seventy years ago. The government cites *Marshfield* and another Seventh Circuit case, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). In both cases, the respective courts upheld the sale of property to a private party without an open market bidding process for the land. *Marshfield*, 203 F.3d at 489-90; *Mercier*, 395 F.3d at 694-95, 702-03.

Although neither the exclusion of other purchasers, nor the fact that Congress acted outside the scope of normal agency procedures for disposing of federal park land is dispositive, both acts demonstrate the government's unusual involvement in this transaction. These facts, coupled with the government's selection of benefi-

ciaries of the land exchange who have a significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunction in this case. We see no basis to upset the district court's conclusion that the VFW was a straw purchaser. *Id.* at 1181.

3. History of the Government's Preservation Efforts

Finally, the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock lead us to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place. In brief, when litigation was first threatened against NPS, Congress banned the use of government funds to remove the cross (§ 133), the first step in forestalling inevitable enforcement of a federal injunction. After litigation commenced, Congress designated the cross and adjoining Preserve property as a national memorial commemorating World War I (§ 8137). Congress also appropriated up to $10,000 for NPS to acquire replicas of the original cross and plaque at the site (*id.*), once more trying to bolster the presence of the cross. Once the district court enjoined display of the cross in *Buono I*, Congress again prohibited the use of federal funds to remove any World War I memorials (which, obviously, includes the cross) (§ 8056(b)); and, while the appeal was pending in *Buono II*, Congress enacted § 8121, directing the transfer of the subject property to a private organization, but maintaining effective government control over the memorial and the use of that property.

The government does not contest these legislative responses to various stages of the litigation in this case, or their purpose aimed at preserving the cross. Rather, the government attempts to diminish their importance. For example, the government argues that § 8137(c), which earmarks funds for the replica plaque and cross, was passed before the district court's injunction and that after the injunction, DOI has taken no action to acquire the replicas. While this may be true, when Congress enacted § 8121, it specifically incorporated the Secretary's duty to carry out the responsibilities set out in § 8137; Congress did not repeal the funding provisions, or any other provision permitting ongoing government control. The funding provisions offer historical evidence of the governmental responses aimed at preserving the cross, as well as ongoing legislative authorizations. In that context, it does not matter whether DOI has exercised its powers to obtain such replicas; the important fact is that Congress directed that it do so, further showing its intent to preserve and maintain the cross.

We agree with the district court that the government engaged in "herculean efforts" to preserve the cross atop Sunrise Rock. *Buono III*, 364 F. Supp. 2d at 1182. We also agree that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.*

B. Continuing Governmental Endorsement of Religion

Our inquiry into a purported cure of an Establishment Clause violation must also analyze whether the improper governmental endorsement of religion has ceased. *See, e.g., Marshfield*, 203 F.3d at 493-96. Be-

cause of the procedural posture of this case, we have necessarily already considered that question. We previously held that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono II*, 371 F.3d at 548-50. We also concluded that a reasonable observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. *Id.* at 550. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately-owned land in the Preserve." *Id.* Nothing in the present posture of the case alters those earlier conclusions. Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement. Nor does the proposed land exchange under § 8121 end the improper government action. Such a transfer cannot be validly executed without running afoul of the injunction.

In sum, the government has not shown the district court's factual findings to be clearly erroneous. Nor has the government shown that the district court applied erroneous legal standards. Finally, the district court's decision does not reflect any clear error of judgment. The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under 16 U.S.C. § 8121 and ordering the government to otherwise comply with its prior injunction that

it not permit the display of the Sunrise Rock cross in the Preserve.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO, PLAINTIFF-APPELLEE

v.

DIRK KEMPTHORNE,[1] SECRETARY OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; JONATHAN B. JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; DENNIS SCHRAMM, SUPERINTENDENT, MOJAVE NATIONAL PRESERVE, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

Argued and Submitted: Apr. 9, 2007
Filed: Sept. 6, 2007
Amended: May 14, 2008

Before: B. FLETCHER and M. MARGARET MCKEOWN, Circuit Judges, and RONALD M. WHYTE,[2] District Judge.

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[1] Dirk Kempthorne is substituted for his predecessor Gail Norton as Secretary of the Department of the Interior. Dennis Schramm is substituted for his predecessor Mary Martin as the Superintendent of the Mojave National Preserve. See Fed. R. App. P. 43(c)(2).

[2] The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

ORDER AMENDING OPINION AND AMENDED OPINION

ORDER

The opinion filed September 6, 2007, slip op. 11793, and appearing at 502 F.3d 1069, is amended as follows:

1. At slip op. 11816 [502 F.3d at 1082], footnote 13, delete "Although the Seventh Circuit adopted a presumption that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion" in the absence of "unusual circumstances," *Marshfield*, 203 F.3d at 491, we decline to adopt such presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area" and substitute: "The Seventh Circuit stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491. Read as a whole, the Seventh Circuit position looks at the issue on a transaction-by-transaction basis. We agree with this approach. However, to the extent that *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption. The Supreme Court's Establishment Clause jurisprudence

recognizes the need to conduct a fact-specific inquiry in this area."

With this amendment, the panel has voted to deny Defendants-Appellants petition for panel rehearing. Judge McKeown votes to deny the petition for rehearing en banc and Judges B. Fletcher and Whyte so recommend.

The full court has been advised of Defendant-Appellant's petition for rehearing en banc, and a judge of this court requested a vote on whether this case should be reheard en banc; however, a majority of the active judges did not vote in favor of en banc consideration. Fed. R. App. P. 35. Judge Reinhardt was recused from considering the en banc issues in this case and did not participate in the court's decision.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be entertained.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges:

The opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated. Because such a novel rule contravenes governing Supreme Court precedent, creates a split with the Seventh Circuit on multiple issues, and invites courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment, I respectfully dissent from our order rejecting rehearing *en banc*.

I

Seventy-four years ago, the Veterans of Foreign Wars ("VFW") erected atop Sunrise Rock in the Mojave National Preserve[1] a memorial to veterans who died in World War I. *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007) ("*Buono IV*"). The memorial took the form of a cross, by which stood a wooden sign stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Fore[ig]n Wars, Death Valley post 2884." *Id.* The sign has since disappeared, and the cross has been replaced several times, most recently in 1998. *Id.* Each incarnation of the memorial was created and installed by private citizens; there is no indication in the record that the citizens ever received permission from the National Park Service ("NPS") to construct the memorial. *Id.*

In 2002, Frank Buono, a retired NPS employee, brought suit against the Department of the Interior, seeking to enjoin the continued presence of the cross on federal land. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204 (C.D. Cal. 2002) (*Buono I*). The district court determined that the presence of the cross on federal land violated the Establishment Clause, and entered an injunction ordering the government to remove the cross. *Id.* at 1217.

During the pendency of the appeal from *Buono I*, Congress enacted legislation ordering the Secretary of the Interior to convey a one-acre parcel of land including Sunrise Rock to the VFW in exchange for a parcel of

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[1] The Mojave National Preserve is a national park that encompasses approximately 1.6 million acres of land in Southern California, approximately 90 percent of which is owned by the federal government. *Buono IV*, 502 F.3d at 1072.

privately-owned land of equal value. Pub. L. No. 108—87, § 8121(a)-(f), 117 Stat. 1054, 1100 (2003) ("Section 8121"). The transfer was conditioned on the VFW's obligation to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war."[2] § 8121(e). Under the terms of the statute, the government retained a reversionary interest in the property "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial." *Id.* Critically, however, section 8121 did not mention the existence of a cross on Sunrise Rock, nor did it require that the VFW retain the cross as part of the memorial.

The agreement also provided that "the Secretary shall continue to carry out the responsibilities of the Secretary under" Pub. L. No. 107—117 § 8137, 115 Stat. 2230 (2002). § 8121(a). Section 8137 required the Secretary to "use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial." Section 8137 does not confer any other authority or obligation on the government.

Soon after the enactment of section 8121, but before the land exchange had been carried out, we affirmed the

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[2] In legislation previously enacted in 2002, Congress designated "[t]he five-foot-tall white cross first erected by the [VFW] in 1934" a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Pub. L. No. 107—117, § 8137, 115 Stat. 2230, 2278-79 (2002) ("Section 8137"); *see also* Pub. L. No. 107—248, § 8065(b), 116 Stat. 1519, 1551 (2002) (barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I").

district court's determination that the presence of the cross on federal land violated the Establishment Clause. *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) ("*Buono II*"). However, we expressly refused to consider "whether a transfer completed under section 8121 would pass constitutional muster." *Id.* at 546.

Following *Buono II*, the government completed the land exchange. Buono then brought the present action, arguing that section 8121 violated the district court's injunction or, in the alternative, that the land transfer itself violated the Establishment Clause. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005) ("*Buono III*"). The district court held that the government continued to violate the injunction following the land transfer, even though ownership of the cross and the underlying land had been transferred to a private party. *See id.* at 1182. Significantly, the district court therefore concluded that "it need not consider [Buono's] other contention that the land transfer itself is an independent violation of the Establishment Clause." *Id.* at 1182 n.8.

The *Buono IV* panel affirmed, holding that the pre-divestment injunction remained enforceable because the government continued impermissibly to endorse religion despite the transfer of Sunrise Rock. *Buono IV*, 502 F.3d at 1086. The panel determined that such endorsement existed because: (1) the government purportedly retained control and oversight over Sunrise Rock, *id.* at 1082-83; (2) the government failed to hold an open bidding process for the land, *id.* at 1084-85; (3) the government purportedly had engaged in "long-standing efforts to preserve and maintain the cross," *id.* at 1085; and (4)

the government continued to endorse religion by permitting the cross at the site, *id.* at 1085-86.[3]

II

Buono IV squarely contradicts two Seventh Circuit opinions holding that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (upholding the sale of a portion of a municipal park on which stood a statue of Jesus with arms extended); *see also Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702-03 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with monument of Ten Commandments). The Seventh Circuit properly applied the principle that once publicly-owned land is transferred to a private party, government action ceases, and the Establishment Clause violation necessarily goes with it. *Marshfield*, 203 F.3d at 491 ("Because of the difference in the way we treat private speech and public speech, the determination of whom we should impute speech onto is critical.").

The "unusual circumstances" exception noted by the Seventh Circuit therefore merely incorporated well-established Supreme Court precedent concerning when state action may be imputed to private parties despite the transfer of once-public land: a continuation of state

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[3] I note that the constitutionality of the transfer itself is not at issue in this case. Because the district court solely concluded that state action persisted and therefore expressly declined to consider whether "the land transfer itself is an independent violation of the establishment clause," *Buono III*, 364 F. Supp. 2d at 1182 n.8, the *Buono IV* opinion presupposes that the transfer is not independently violative.

action may be found "when a set of unusual facts and circumstances demonstrate[ ] that the government remain[s] intimately involved in exclusively public functions that ha[ve] been delegated to private organizations." *Id.* at 492 (citing *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L. Ed. 1152 (1953); *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946)). That is, state action may be imputed to private parties in the "extraordinary circumstance[ ]" that the "transfer [has not] eliminated the actual involvement of the [government] in the daily maintenance and care of the [property]." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n. 8, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) (discussing *Evans*, 382 U.S. at 301, 86 S. Ct. 486); *see Marshfield*, 203 F.3d at 492.

Under such precedent, the only relevant issue is whether there is continuing state action, absent which the government's intent or any atypical circumstances are of no consequence. *See Marshfield*, 203 F.3d at 491; *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring) ("[A]n Establishment Clause violation must be moored in government action of some sort."); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). Indeed, the court in *Marshfield* upheld the relevant land sale despite the appellants' contention that it was a "'sweetheart deal' . . . concocted to circumvent the govern-

ment action requirement," precisely because the sale extinguished state action. 203 F.3d at 491; see also *Mercier*, 395 F.3d at 702 (rejecting the argument that the transfer was unconstitutional because "[t]he City Council knew that it was faced with a lawsuit seeking the removal of the Monument").

Nevertheless, the *Buono IV* opinion splits from the Seventh Circuit's rule and from binding Supreme Court precedent by creating an "unusual circumstances" test that extends well beyond the limited circumstances in which state action persists. That is, *Buono IV* improperly faults the government for:

- (1) Having the purported authority to control Sunrise Rock, despite the utter lack of evidence that it would actually contribute to the maintenance and care of the memorial;

- (2) Possessing the intent to preserve the Sunrise Rock memorial, even though such consideration is irrelevant absent state action; and

- (3) Failing to hold an open bidding process, even though *Marshfield* and the *Evans* line of cases demonstrate that state action ceases once Sunrise Rock is privately owned.

What is altogether missing in this case is *any* evidence that the government has maintained or will maintain or support the Sunrise Rock cross after the land transfer.[4] See *Evans*, 382 U.S. at 301, 86 S. Ct. 486 (relying on the fact that, following the government's resignation as

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[4] As *Marshfield* plainly suggests, the reversionary clause in section 8121 does not constitute state action where the government has not "made any effort to enforce [it]." 203 F.3d at 492-93.

trustee over the relevant land, "there has been no change in municipal maintenance and concern over [it]," such that "[w]hether these public characteristics will in time be dissipated is wholly conjectural"); *Marshfield*, 203 F.3d at 493 (declining to conjecture on "the conduct of the parties following the sale of [the] property").

Accordingly, while the *Buono IV* opinion pays lip service to the "unusual circumstances" exception mandated by the *Evans* line of cases, it has bestowed upon judges the extraordinary authority to enjoin private parties from displaying religious symbols on their own land based solely on the government's pre-divestment conduct, absent any showing that the government would remain "intimately involved" in the care and maintenance of privately-owned land.

Moreover, the deference owed to Congress forecloses us from striking down legislation based upon a presumption that the government will violate the Constitution in the future. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."); *see also Wash. State Grange v. Wash. State Republican Party*,—U.S.—, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."); *INS v. St. Cyr*, 533 U.S. 289, 300 n. 12, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) ("[T]he elementary rule is that every reasonable con-

struction must be resorted to, in order to save a statute from unconstitutionality.") (internal quotation marks omitted). By holding that the district court could invalidate section 8121 without a finding that the government would remain "intimately involved" in the maintenance and care of the Sunrise Rock memorial post-divestment, the *Buono IV* opinion flouts such "fundamental principle of judicial restraint." *Wash. State Grange,* 128 S. Ct. at 1191.

III

Buono IV also splits from the Seventh Circuit on a second, equally important issue. After holding that the government failed the *Lynch* endorsement test by inadequately distancing itself from the Sunrise Rock memorial, the opinion upholds a remedy compelling the VFW to sacrifice *its* private rights in Sunrise Rock to cure the *government's* constitutional violation. *Buono IV,* 502 F.3d at 1085-86; *see also Buono II,* 371 F.3d at 548-49 (discussing *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)).

Yet the Seventh Circuit correctly held that a private party's rights may not be brushed aside to remedy the government's violative conduct; rather, the only proper remedy is to enjoin the government's improper conduct. *See Marshfield,* 203 F.3d at 497 ("[E]ither the Fund, a private land owner, must be estopped from exercising its right to free exercise and freedom of speech on its own property, or some way must be found to differentiate between property owned by the Fund and property owned by the City. The latter—not the former—is the appropriate solution."). Indeed, on remand in *Marshfield,* the district court required that the government erect a fence around the statue; the statue, however, was permitted to

remain on the now-private property, precisely because of the protection owed to the private landowner under the First Amendment. *See Freedom From Religion Found., Inc. v. Marshfield*, No. 98—C—270—S, 2000 WL 767376 (W.D. Wis. May 9, 2000).

By holding that a private citizen's rights may be infringed simply because his land was publicly owned in the past, or because it presently sits next to publicly-owned land, or because a hypothetical viewer might mistakenly confuse it with such land, the *Buono IV* opinion recklessly splits from the Seventh Circuit and announces a broad and unprecedented rule that should not be allowed to stand.[5]

IV

Moreover, while the *Buono IV* opinion concludes that the government will continue to endorse religion even after transferring Sunrise Rock to the VFW, the opinion fails even to *mention* the government's argument that the pre-divestment injunction was mooted by the Supreme Court's intervening decisions in *McCreary County v. ACLU*, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005), and *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005). Because the central considerations in *Van Orden* are almost entirely on point with the facts of *Buono IV*, such precedent forecloses the continued enforcement of the injunction.

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[5] Indeed, such reasoning equally applies to the *Buono IV* opinion's conclusion that the government retained authority to control Sunrise Rock. The appropriate remedy would be to enjoin such alleged government control, rather than to require the removal of the memorial despite the VFW's private ownership of it.

As was the case in *Van Orden*, the Sunrise Rock memorial was constructed by a private, secular organization—indeed, the memorial in this case was installed without government permission—away from a captive audience, and both were packaged with a "nonsectarian text" evincing a clearly secular purpose. *Van Orden*, 545 U.S. at 701-02, 125 S. Ct. 2854 (Breyer, J., concurring). Moreover, just as Justice Breyer's controlling concurrence in *Van Orden* found dispositive that the Ten Commandments statue had existed for 40 years before the underlying suit, the Sunrise Rock cross has existed for nearly *double* that amount of time. *See id.* at 702, 125 S. Ct. 2854 ("As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged . . . [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting . . . to a government effort to favor a particular religious sect, primarily to promote religion . . . ."); *compare McCreary*, 545 U.S. at 851, 125 S. Ct. 2722 (Ten Commandments statues were put in place by government officials in 1999).

While the cross at Sunrise Rock takes the form of an ordinarily religious symbol, it serves the secular purpose of memorializing fallen soldiers.[6] Of course, the

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[6] Indeed, there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I. To name some examples: the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery; the French Cross Monument in the Cypress Hill National Cemetery; the Peace Cross in Bladensburg, Maryland; the Unknown Soldiers Monument in Prescott National Cemetery; and the Wall of Honor at the Pennsylvania Military Museum. These monuments surely honor sol-

monument in *Van Orden* was also an ordinarily religious symbol, but that fact alone was insufficient to constitute a violation of the Establishment Clause. *See Van Orden*, 545 U.S. at 703, 125 S. Ct. 2854 (concluding that the monument "serv[ed] a mixed but primarily nonreligious purpose"). Additionally, while the statue in *Van Orden* was placed in a "large park" with other monuments, the lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose. *See id.* at 701-02, 125 S. Ct. 2854; *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (noting that public complaints "did not surface until the monument had been in place for over thirty years").[7]

By altogether ignoring the dispositive considerations in *Van Orden*, the *Buono IV* opinion vitiates the Supreme Court's caution against applying the endorsement test in a manner that has "radical implications for our public policy." *Pinette*, 515 U.S. at 768, 115 S. Ct. 2440 (1995) (plurality opinion); *see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) ("There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.") (internal quotation marks omitted).

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diers of all creeds, and no reasonable viewer would conclude that they exclude or discount the sacrifice of non-Christians.

[7] *Van Orden* certainly may not be construed as narrowly requiring such a clustering of monuments; Justice Breyer's concurrence explicitly cited other factors in determining that its presence on state land did not violate the Establishment Clause. *See Van Orden*, 545 U.S. at 701-02, 125 S. Ct. 2854.

V

In addition to discussing the foregoing inter-circuit and precedential conflicts, I must voice my strong disagreement with the merits of the *Buono IV* opinion.

A

First, *Buono IV* concludes that "the various statutes" involved in this case, "when read as a package, evince continuing government control." *Buono IV*, 502 F.3d at 1082. However, while the NPS Director, under the supervision of the Secretary of the Interior, is responsible for overall management and supervision of the Mojave National Preserve, including "the supervision, management, and control of national monuments," 16 U.S.C. § 2, such authority applies only to *federal* land, *see* 16 U.S.C. § 431 (authority to declare national monuments expressly limited to objects "situated upon the lands owned or controlled by the Government of the United States"); *see also* 16 U.S.C. § 1 ("The service thus established shall promote and regulate the use of the *Federal* areas known as national parks, monuments, and reservations hereinafter specified . . . ."") (emphasis added). Additionally, while § 431 provides that the Secretary of the Interior may accept relinquishment of privately-owned property to provide "the proper care and management" of monuments, it does not authorize government officials forcibly to take private property to provide such care or to enter private land.

Section 8121(a), likewise, provides little support for the opinion's conclusion, as it merely requires the Secretary of the Interior to carry out the duties set forth in section 8137. Section 8137 very clearly delineates the limited obligations owed by the Secretary, namely that the Secretary "acquire a replica of the original memorial

plaque and cross placed at the national World War I memorial," and "install the plaque in a suitable location on the grounds of the memorial." Simply put, if Congress wanted to retain the broad oversight suggested by the *Buono IV* opinion, it would have said as much, particularly if it was so firmly committed to ensuring that the Sunrise Rock memorial will retain its present form.[8] Indeed, it is telling that the district court came to precisely the same conclusion. *See Buono III*, 364 F. Supp. 2d at 1180 (finding that section 8121 "[gave] the Secretary access to the subject property in the form of an easement or license for a particular purpose," namely, to make a replica of the statue and install a replica of the plaque). I fail to see how such trivial, fleeting duties constitute "intimate involvement" sufficient to strike down section 8121.

B

Second, *Buono IV* faults the government for failing to hold a hearing before transferring the land to the VFW, determining that such conduct constituted the improper "exclusion of other purchasers." 502 F.3d at 1084-85. The opinion cites 16 U.S.C. § 460*l*-22 in support, but that statute is wholly irrelevant, as it solely concerns land transfers initiated by the Secretary of Interior, whereas the land exchange in question here was directly authorized by Congress. *See id.* Contrary to the suggestion in *Buono IV*, under § 460 *l*—22(b), the

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[8] Likewise, as noted, the reversionary clause in section 8121 cannot constitute state action absent an attempt by the government to exercise it. *See Marshfield*, 203 F.3d at 491-93 (holding that a covenant requiring that the transferred land be used as a public park "will not affect the validity of the transfer" because "[t]he plaintiffs do not contend that the City has made any effort to enforce this restrictive covenant").

Secretary is required to hold an open bidding process *only* "[u]pon request of a State or a political subdivision thereof, or of a party in interest, prior to such exchange." There is no indication in the record that any such party requested a hearing in this case. Thus, even if Congress is somehow bound by subordinate administrative rules, the transfer of Sunrise Rock was perfectly appropriate under the plain language of § 460*l*—22(b).[9]

In any event, the *Buono IV* opinion comes to the perplexing conclusion that Congress's failure to comply with "agency procedures" binding solely the Secretary of Interior demonstrates that *Congress* acted inappropriately in its failing to hold an open bidding process. *Buono IV*, 502 F.3d at 1085. I am unaware of any precedent suggesting that *congressional* action is in any way suspect where it fails to adhere to an *agency*'s procedural rules. I also am unaware of any precedent disparaging a land transfer for having been enacted in an appropriations bill, nor does the *Buono IV* opinion cite to *any* caselaw in support of such consideration. 502 F.3d at 1084.[10]

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[9] Even assuming that 16 U.S.C. § 460*l*—22 is relevant to its decision, *Buono IV* errs in discussing § 460 *l*—22(a). As the district court found and the parties expressly conceded on appeal, the land exchange in this case would have been governed solely by § 460 *l*—22(b) had it been authorized by the Secretary of the Interior rather than mandated by Congress. *See Buono III*, 364 F. Supp. 2d at 1181.

[10] Moreover, here again the opinion shrugs off the conflicting holdings in *Marshfield* and *Mercier*, which "upheld the sale of property to a private party without an open market bidding process." *Buono IV*, 502 F.3d at 1084-85; *see also Marshfield*, 203 F.3d at 492-93; *Mercier*, 395 F.3d at 702-03. Indeed, as in those cases, the Sunrise Rock memorial was transferred to the most "logical purchaser," namely the organization that constructed the memorial in the first place. *Buono IV*, 502 F.3d at 1084-85. The panel fails to provide any reason for diverging

C

Third, the opinion points to "the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock" as supporting the conclusion "that the government's purpose in this case is to evade the injunction and keep the cross in place." *Buono IV*, 502 F.3d at 1085. Whether the government sought to evade the injunction in the past is collateral to the issue before us; the only relevant issue is whether the transfer rendered the injunction moot by divestment of Sunrise Rock to a private party. *See Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007) (holding that an injunction prohibiting, under the California Constitution, the continued existence of a cross on municipal property was rendered moot when the municipality transferred the land to the federal government, which is not bound by state law); *cf. Staley v. Harris County*, 485 F.3d 305, 308-09 (5th Cir. 2007) (en banc) (holding that an injunction ordering the removal of a religious monument was mooted by the municipality's decision to temporarily remove the statue). Of course, the government may moot an injunction by *curing* the violation that spurred it; *Paulson*, as well as common sense, compel no less. Accordingly, *Buono IV* faults the government for engaging in conduct that was perfectly permissible. I fail to see why the government's past, unsuccessful efforts to cure the Establishment Clause violation should foreclose it from pursuing further *legitimate* efforts.

In any event, given our opinion in *Buono II*, it is easy to understand why the government would conclude that carrying out the land transfer was an appropriate re-

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from the Seventh Circuit's holdings, short of discussing the purported conflict with "normal agency procedures."

sponse: we based our holding that the Sunrise Rock cross violated the Establishment Clause on its having been situated on "publicly-owned land," and we expressly refused to address the constitutionality of a land transfer under section 8121. *Buono II*, 371 F.3d at 548-49. Accordingly, the government reasonably concluded that we *condoned* the land transfer, notwithstanding a subsequent decision on the constitutionality of section 8121; to fault the government for carrying out section 8121 is nothing short of a judicial "bait-and-switch." If anything, transferring the land was the obvious next step in attempting to cure the violation while ensuring the continued presence of a 74-year-old war memorial. *See Mercier*, 395 F.3d at 705 ("The City is able to extricate itself completely from the implied endorsement of the purpose and content of the religious symbol, yet the Monument can remain in the location it has occupied for many years.").

VI

The *Buono IV* opinion contravenes binding Supreme Court precedent, creates a split from the Seventh Circuit on multiple issues, invests judges with the dangerous and unprecedented authority to infringe upon fundamental private rights, and rests on patently flawed reasoning. I sympathize with my colleagues' frustration that a court can lose control of its injunction by the enjoined party's unanticipated abdication of ownership, thus mooting the case. But such risk is inherent in our trade, and for good reason.

I therefore respectfully dissent from our unfortunate decision not to rehear this case *en banc*.

OPINION

McKEOWN, Circuit Judge:

A Latin cross sits atop a prominent rock outcropping known as "Sunrise Rock" in the Mojave National Preserve ("Preserve"). Our court previously held that the presence of the cross in the Preserve—which consists of more than 90 percent federally-owned land, including the land where the cross is situated—violates the Establishment Clause of the United States Constitution. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). We affirmed the district court's judgment permanently enjoining the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

During the pendency of the first appeal, Congress enacted a statute directing that the land on which the cross is situated be transferred to a private organization in exchange for a parcel of privately-owned land located elsewhere in the Preserve. *See* Pub. L. No. 108—87, R. 12.1, 12.4 § 8121(a)-(f), 117 Stat. 1100 (2003). That land exchange is already in progress and would leave a little donut hole of land with a cross in the midst of a vast federal preserve. The issue we address today is whether the land exchange violates the district court's permanent injunction. We conclude that it does, and affirm the district court's order permanently enjoining the government from effectuating the land exchange and ordering the government to comply with the original injunction.

BACKGROUND[1]

I. THE MOJAVE NATIONAL PRESERVE

The Preserve encompasses approximately 1.6 million acres, or 2,500 square miles, of primarily federally-owned land in the Mojave Desert, located in Southeastern California. In 1994, the Bureau of Land Management ("BLM") transferred the land to the National Park Service ("NPS"); both the BLM and the NPS are federal agencies under the Department of the Interior ("DOI"). Within the Preserve, approximately 86,000 acres of land are privately owned and 43,000 acres belong to the State of California. Thus, slightly more than 90 percent of the land in the Preserve is federally owned. The Preserve is a "unit of the National Park System" and is given "statutory protection as a national preserve." 16 U.S.C. § 410*aaa*—41, 410*aaa*—42; *id.* § 1(c). The Preserve is under NPS jurisdiction and authority. *Id.* § 410*aaa*-46.

II. THE CROSS

The current incarnation of the cross atop Sunrise Rock is between five and eight feet tall and is constructed out of four-inch diameter metal pipes painted white. It is a Latin cross, meaning that it has two arms, one horizontal and one vertical, at right angles to one another. It is undisputed that "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I*, 212 F. Supp. 2d at 1205.

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[1] Further background detail is found in the district court's order and our prior opinion on the merits of the Establishment Clause challenge. *See generally Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) ("*Buono I*"); *Buono*, 371 F.3d 543 (9th Cir. 2004) ("*Buono II*").

Historic records reflect that a wooden cross was built on that location as early as 1934 by the Veterans of Foreign Wars ("VFW") as a memorial to veterans who died in World War I. Photographs depict the wooden cross and signs near it stating: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884." The wooden signs are no longer present, and the original wooden cross, which is no longer standing, has been replaced by private parties several times since 1934. The cross has been an intermittent gathering place for Easter religious services since as early as 1935, and regularly since 1984.

The current version of the cross was built by Henry Sandoz, a local resident, sometime in 1998. When NPS investigated the history of the cross, Sandoz explained that he drilled holes into Sunrise Rock to bolt the cross in place, making it difficult to remove. Sandoz did not receive a permit from NPS to construct the cross.

Following *Buono I's* injunction against display of the cross, the cross has been covered by a plywood box. When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to act as a memorial for war veterans.

III. Litigation over the Cross and the Congressional Response

The current controversy surrounding the cross surfaced in 1999, when NPS received a request from an individual seeking to build a "stupa" (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead located near the cross. NPS denied that request, citing

36 C.F.R. § 2.62(a)[2] as prohibiting the installation of a memorial without authorization. A hand-written note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest." The letter also indicates that "[c]urrently there is a cross on [a] rock outcrop located on National Park Service lands . . . . It is our intention to have the cross removed."

In 1999, NPS undertook a study of the history of the cross. NPS determined that neither the cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, NPS recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Following the announcement by NPS of its intention to remove the cross, the United States Congress passed a series of laws, described below, to preserve the Sunrise Rock cross. The first piece of legislation, enacted in December 2000, provided that no government funds could be used to remove the cross. *See* Pub. L. No. 106—554 § 133, 114 Stat. 2763A—230 (2000) (hereafter "§ 133").[3]

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[2] The regulation provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." 36 C.F.R. § 2.62(a).

[3] "None of the funds in this or any other Act may be used by the Secretary of the Interior to remove *the five-foot-tall white cross* located within the boundary of the Mojave National Preserve in southern Cali-

A. *Buono I*

Frank Buono[4] filed suit in March 2001 against the Secretary of the DOI, the Regional Director of NPS, and the Superintendent of the Preserve (collectively, "NPS" or "Defendants"). The district court concluded that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono I*, 212 F. Supp. 2d at 1215-17. In July 2002, the court entered a permanent injunction ordering that the "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[5]

B. Designation of the Cross as a National Memorial

In January 2002, while this matter was pending in district court, Congress passed a defense appropriations bill, which included a section designating the Sunrise Rock cross as a "national memorial." *See* Pub. L. No. 107-117 § 8137, 115 Stat. 2278-79 (2002), *codified at* 16

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fornia first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15." § 113 (emphasis added).

[4] Buono is a retired NPS employee who worked for the agency from 1972 to 1997. From September 1994 to December 1995, Buono worked as the Assistant Superintendent of the Preserve.

[5] We granted the government's motion to stay the injunction pending appeal, insofar as the injunction required NPS to immediately remove or dismantle the cross. The stay did not apply to any "alternative methods" for complying with, or additional obligations imposed by, the district court's order. *See Buono II*, 371 F.3d at 545 n.1 (discussing stay orders). During the appeal, NPS covered the cross, first with a large tarpaulin and later with a plywood box, which the government asserts will remain in place pending resolution of this action.

U.S.C. § 410*aaa*—56 (note) (hereafter "§ 8137"). That section provides:

> (a) DESIGNATION OF NATIONAL MEMORIAL. —*The five-foot-tall white cross* first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, *is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.*
>
> (b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.
>
> (C) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than *$10,000 of funds* available for the administration of the Mojave National Preserve to *acquire a replica of the original memorial plaque and cross placed at the national World War I memorial* designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Id. (emphases added). The cross is designated the "White Cross World War I Memorial." 16 U.S.C. § 431 (note).

NPS is statutorily charged with "the supervision, management, and control of the several national parks and national monuments." 16 U.S.C. § 2. National "memorials" fall within the broader category of national "monuments." *See* 16 U.S.C. § 431 (note) (identifying recognized national monuments, including various categories of "national monuments" and "national memorials").

In October 2002, less than three months after the district court's injunction, in legislation aimed at the Sunrise Rock cross, Congress passed a defense appropriations bill that included a provision barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I." Pub. L. No. 107—248 § 8065(b), 116 Stat. 1551 (2002) (hereafter "§ 8065").

C. *BUONO II* AND PASSAGE OF § 8121

The government appealed the district court's order and injunction. In September 2003, one month after oral argument before a panel of our court but before a decision issued, Congress enacted another defense appropriations bill that included a land exchange agreement regarding the Sunrise Rock cross. *See* Pub. L. No. 108—87 § 8121(a)-(f), 117 Stat. 1100 (2003), *codified at* 16 U.S.C. § 410*aaa*—56 (note), (hereafter "§ 8121"). The statute provides:

> (a) EXCHANGE REQUIRED.—*In exchange for the private property described in subsection (b)*, the Secretary of the Interior *shall convey* to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post # 385E (in this section referred to as the "recipient"), all right, title, and interest of the

United States in and to *a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated* (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107—117; 115 Stat. 2278)) *as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.* Notwithstanding the conveyance of the property under this subsection, *the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.*

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569—051—44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

§ 8121(a)-(b) (emphases added). The government retains a reversionary interest in the property as follows:

(e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. *If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.*

§ 8121(e) (emphasis added). The cross-reference in § 8121(a) to § 8137 pertains to use of federal funds to acquire a replica cross and plaque. *See* § 8197(c). The land transfer was underway when the district court enjoined its enforcement, as described below.

In June 2004, in affirming the district court's permanent injunction, we held that the presence of the cross in the Preserve violates the Establishment Clause, agreeing with the district court that this case is "squarely controlled" by *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) ("*SCSC*"). *Buono II*, 371 F.3d at 548. In *SCSC*, we reasoned that the presence of a cross on city land, even where it bore a plaque dedicating the cross as a war memorial to veterans, 93 F.3d at 618, violated the Establishment Clause because "the presence of the cross may reasonably be perceived as governmental endorsement of Christianity." *Id.* at 620.

The government's several attempts to distinguish *SCSC* were not persuasive. For example, we held that it was "of no moment" that the cross in *SCSC* was significantly taller, located in an urban area, or illuminated during certain holidays:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement. . . . Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is

> not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

Buono II, 371 F.3d at 549-50 (emphasis added).

We also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, *would believe—or at least suspect*—that the cross rests on public land because of the vast size of the Preserve, more than 90 percent of which *is* federally owned. *Id.* at 550 (citing reasonable observer test set forth in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). A reasonably informed observer aware of the history of the Sunrise Rock cross would know not only that the cross was erected by private individuals (which the government argued favored its view), but also that Congress has taken various measures to preserve the cross, i.e., designating it a war memorial, prohibiting use of federal funds to remove it, and denying similar access for a Buddhist shrine. *Id.*

Acknowledging the passage of § 8121 while the appeal was pending, we addressed the government's challenge that § 8121 rendered the appeal moot or would soon do so. We rejected the government's mootness challenge for two reasons: First, we held that the case was not moot because the land transfer had not yet taken effect. *Id.* at 545. Second, because "[m]ere voluntary cessation of allegedly illegal conduct does not moot

a case," we held that *even if* the land transfer had taken effect, the government still had not carried its heavy burden to show mootness. *Id.* at 546. Even if the land were transferred under § 8121(a), it *may revert* to the government under § 8121(c), or as provided in other statutes. In particular, we noted that 16 U.S.C. § 431 authorizes relinquishment of lands containing "national monuments" to the federal government, and 16 U.S.C. § 410*aaa*—56 authorizes the Department of the Interior to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange." *Id.* at 546 (discussing § 8121, 16 U.S.C. §§ 431, 410*aaa*—56).

D. *BUONO III*

Despite the injunction against display of the cross in the Preserve, the government began moving forward with the mechanics of the land exchange under § 8121. Buono then moved to enforce the district court's prior injunction, or modify it to prohibit the land exchange as a violation of the Establishment Clause. In April 2005, the district court granted Buono's motion to enforce the injunction, and denied as moot the request to amend the permanent injunction. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1177, 1182 & n.8 (C.D. Cal. 2005) ("*Buono III*"). According to the district court, "the transfer of the Preserve land containing the Latin Cross which as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1182 (citation and quotation marks omitted). The district court deemed the exchange

"invalid" and permanently enjoined the government "from implementing the provisions of Section 8121 of Public Law 108—87" and ordered the government "to comply forthwith with the judgment and permanent injunction entered by th[e] court on July 24, 2002." *Id.* It is that decision that the government now appeals.

STANDARD OF REVIEW

We review for abuse of discretion the district court's order enforcing its prior injunction. *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002). A district court abuses its discretion in this regard if "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.*

ANALYSIS

In the district court, Buono advanced two alternative arguments challenging the land exchange under § 8121. First, Buono argued that the land exchange is an attempt to evade the permanent injunction. Alternatively, he argued that the land exchange itself violates the Establishment Clause because it is an improper governmental endorsement of religion. The district court's holding is grounded only on the first basis, i.e., that the land exchange is a sham transaction with the purpose of permitting continued display of the cross in violation of the permanent injunction. On appeal, the government contends that § 8121 was a bona fide attempt by Congress to comply with the injunction. The government also argues that because it was not given the opportunity to fully effectuate the transfer, there are unknown facts that render this controversy "unripe" for judicial review.

Turning first to the government's ripeness challenge, we conclude that this controversy is ripe for review. As to the second question, the district court did not abuse its discretion in enforcing the injunction. We agree that the exchange effectuated by § 8121 violates the injunction, which prohibits the display of the Latin cross because it runs afoul of the Establishment Clause.

I. RIPENESS

Ripeness is a justiciability requirement that seeks to avoid premature litigation of disputes. *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 579-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) ("[R]ipeness is peculiarly a question of timing.") (citations omitted). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993); *accord Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-42 (9th Cir. 2000) (en banc) (discussing constitutional and prudential components of ripeness). The ripeness question we address is whether it is premature to consider a violation of the injunction before completion of the land exchange.

A. CONSTITUTIONAL COMPONENT OF RIPENESS

The constitutional component of ripeness—that there be an Article III "case or controversy"—requires a concrete impact upon the parties arising from the dispute. *Union Carbide*, 473 U.S. at 579, 105 S. Ct. 3325. This analysis is similar to the injury-in-fact inquiry under the standing doctrine. *See Anchorage Equal Rights Comm'n*, 220 F.3d at 1138-39.

The government argues that before litigation proceeds, it should be given an opportunity to try to execute the land exchange in compliance with the prior injunction and the government's constitutional obligations. Buono responds that the "concrete" injury ripe for review is that the land transaction's very structure evidences its lack of a secular purpose and its effect continues the government's improper endorsement of religion that we already held exists.

This case can best be described as an ongoing controversy about the cross, the specifics of which shift with successive congressional enactments. The controversy is neither premature nor will it go away on its own. Given the specifics of § 8121, it is no answer to say that the land exchange is not complete. It is, as the district court notes, "already in progress," and the government intends to complete it. *Buono III*, 364 F. Supp. 2d at 1178. Buono's challenge to the present terms of the exchange is not a "hypothetical request[ ] for an advisory opinion." *Anchorage Equal Rights Comm'n*, 220 F.3d at 1141.

The Supreme Court has held that pre-enforcement review of a statute is appropriate where the governmental purpose in enacting the statute evidences an improper endorsement of religion in violation of the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). It is no legal leap to conclude that pre-enforcement review is similarly appropriate where the purpose of a statute is to evade an injunction intended to end an ongoing Establishment Clause violation.

In *Santa Fe*, the Supreme Court considered the ripeness of a facial challenge to a school district's policy purportedly allowing school prayer. *Id.* The policy permit-

ted students (a) to vote on whether there should be a student-delivered invocation given at the start of high school football games, and (b) to later vote to select the one student who would deliver the invocation at all games throughout the year. *Id.* at 297-98, 120 S. Ct. 2266. The school district argued that it was premature to review the policy because there "can be no certainty that any of the statements or invocations will be religious." *Id.* at 313, 120 S. Ct. 2266. Rejecting that challenge, the Court concluded that while forcing a student "to participate in religious worship" was a serious constitutional injury, so too was the "mere passage by [the school district] of a policy that has the purpose and perception of government establishment of religion . . . . [and] the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote." *Id.* at 313-14, 120 S. Ct. 2266 (recognizing that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring)). Thus, the mere enactment of the policy, particularly in light of the school district's conduct, was a sufficient constitutional injury to warrant pre-enforcement review, and ultimately an injunction against implementation of the policy. *Id.* at 316, 120 S. Ct. 2266.[6] Importantly, in analyzing ripe

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[6] Our cases have similarly held that passage of a statute and putting it into effect (even if the effect is not complete) gives rise to a dispute ripe for judicial review. In *Saint Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983), a church-run hospital challenged the National Labor Relations Board's jurisdiction over it as a violation of the Establishment Clause. *Id.* at 1440. Congress had amended the National Labor Relations Act expressly conferring jurisdiction over

ness, the Court looked to the history of the school district's conduct in enacting the policy and the true purpose of the policy. *Id.* at 314-15, 120 S. Ct. 2266.

The analogy to *Santa Fe* is apt. Here, both the district court and this court have concluded that a grave constitutional injury *already exists.* The permitting display of the Sunrise Rock cross in the Preserve is an impermissible governmental endorsement of religion. *See Buono II*, 371 F.3d at 548-50. As discussed further below, the constitutional injury will persist after—and as a result of—the land exchange effectuated under § 8121. This is so because (among other things) § 8121 and other applicable statutes[7] permit the government's significant *ongoing control* of and involvement with the cross and the property on which it is situated. *See Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266 (concluding that the text of the school district's policy alone reveals the extent of school involvement in the election of the student speaker and the content of the message to be delivered). And, the government's repeated actions in preserving the cross (and forestalling enforcement of the injunction) further evidence its goal of keeping the cross in place, *see* §§ 133, 8137, 8056(b), 8121, just as the school district in *Santa Fe* acted with the purpose of maintaining a

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nonprofit hospitals without excepting those run by religious institutions. We concluded that the question of NLRB's jurisdiction was ripe for review. *Id.* In *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of the State of Montana*, 792 F.2d 782 (9th Cir. 1986), we held that the claim of Indian tribes challenging the validity of a cooperative agreement regarding agency jurisdiction to advise the tribes about oil and gas rights was sufficiently ripe where the final cooperative agreement had been placed into operation by the agreeing agencies. *Id.* at 788-89.

[7] *See* § 8137(a)-(c), 16 U.S.C. §§ 431, 410*aaa*—56.

school policy permitting prayer at school events. *Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266.[8]

Buono has alleged a sufficient constitutional injury to overcome any argument that his challenge to § 8121 is unripe. *See Santa Fe*, 530 U.S. at 314-15, 120 S. Ct. 2266. The challenge in this case presents a concrete injury, rather than an "imaginary" or "speculative" one.[9]

B. Prudential Component of Ripeness

Even where a concrete case or controversy is present, we consider whether, because of prudential concerns, we should decline to exercise jurisdiction. *See Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325; *Anchorage Equal Rights Comm'n*, 220 F.3d at 1141. We evaluate two interrelated factors: (a) the hardship that the party seeking relief will suffer from withholding judicial

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[8] The various governmental actions are discussed in further detail *infra* § II.A.3.

[9] The government can hardly rely, as a predicate for a ripeness challenge, on its attempt to temporarily comply with the permanent injunction by covering the cross with a wooden box. If that were the final compliance mechanism, the district court could determine whether it is sufficient. Significantly, however, the government is proceeding with the land exchange. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, —U.S.—, 127 S. Ct. 2738, 2751, 168 L. Ed. 2d 508 (2007) (holding that school district's voluntary cessation of use of racial tie breaker pending outcome of litigation did not negate Article III standing of plaintiff group members challenging policy, as the school continued to vigorously defend the policy in court); *Friends of Earth, Inc. v. Laidlaw Envt'l Svcs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that voluntary cessation of wrongful conduct, either by defendant's achievement of substantial compliance with its permit requirements or its shutdown of offending facility, did not moot controversy over defendant's compliance with Clean Water Act because the offending conduct had not permanently ceased).

action, and (b) the fitness of the issues in the record for judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

This case easily satisfies both prudential components. As to the harm, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325 (internal quotations and citations omitted).[10] The hardship resulting from the continuation of an Establishment Clause violation enjoined by the court is sufficient.

A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994) (citations omitted). These requirements are satisfied here.

The key issue is primarily a question of law, i.e., whether the land exchange under § 8121 violates the district court's order permanently enjoining the government from permitting display of the cross in the Preserve. *See, e.g., Santa Fe*, 530 U.S. at 314, 120 S. Ct. 2266 (permitting facial challenge to school district's policy prior to enforcement of the policy based largely on the Court's ability to construe the constitutionality of

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[10] Unlike in *Anchorage Equal Rights Comm'n*, where the plaintiffs sought review of a housing law "in a vacuum and in the absence of any particular victims of discrimination," 220 F.3d at 1142, in this case there is a concrete victim—Buono—and the statutes are not being analyzed in a vacuum. *See, e.g., Buono III*, 364 F. Supp. 2d at 1181-82 (discussing history of government's preservation efforts regarding the cross).

the policy's purpose as a legal matter); *Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325 (granting pre-enforcement review of constitutionality of administrative scheme requiring registrants to participate in binding arbitration of disputes with limited judicial review because party's challenge raised solely legal issues).

Next, we assess the state of the factual record, an inquiry that overlaps with (and in this case collapses into) the third component, the finality of the decision. *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982). The government argues that the record is incomplete because certain factual scenarios, as yet unknown, could occur at some time in the future. The government illustrates its claim by positing two potential scenarios that may occur rendering decision on this appeal premature. Upon examination, neither proposed scenario persuades us that we should delay decision in this matter.

First, the government argues that once the land exchange is complete the VFW *might* at some point in the future *remove* the cross, but continue to maintain the property as a "war memorial" as provided under § 8121. Thus, according to the government, the court should not decide whether the injunction is violated unless and until the land exchange is complete and the VFW has an opportunity to decide whether to maintain or remove the cross.

Under the government's construction, the dispute would never be ripe because, even if the transfer occurred, the government or the VFW could always argue that removal of the cross could occur at some point in the future. Such gamesmanship is not sanctioned by our prudential ripeness doctrine.

The government's view is also at odds with two statutes related to the Sunrise Rock cross, which, when read together, demonstrate that the VFW cannot remove the cross without forfeiting the property to the government. Section 8137(a) designates "*the five-foot-tall white cross*" . . . as a "national memorial." § 8137(a) (emphasis added); *see also* § 8137(b) (referring to "[t]he memorial cross"); 16 U.S.C. § 431 (note) (listing "national memorial" titled "White Cross World War I Memorial"). In other words, the cross itself is the memorial. Section 8121(e) conditions transfer of the land on the VFW's agreement to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8121(e). Section 8121(e) further provides that if "the conveyed property is no longer being maintained as a war memorial, the property *shall revert* to the ownership of the United States." *Id.* (emphasis added). Under these two statutes, the VFW's removal of the cross from Sunrise Rock would trigger the reversionary clause of § 8121(e) and the land would revert to the United States. Nothing permits the VFW to destroy a national memorial, remove the cross, and erect a substitute memorial. The entire scheme is directed to preservation of the cross.

To suggest that we do not yet know enough facts to decide this dispute ignores the practical reality of these statutory mandates. In *Santa Fe*, the Court rejected the school district's similarly implausible explanations for its conduct, based on the history and context of the school district's actions:

> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High

> School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose*, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Santa Fe, 530 U.S. at 315, 120 S. Ct. 2266 (emphasis added).

The government also argues that DOI might never exercise the reversionary clause, even if the cross is removed. Again, this argument fails as § 8121(e) itself provides that the property "shall revert" if the property is no longer maintained as a "war memorial," i.e., *the cross* under § 8137. Countenancing this argument would also render the claim perpetually unripe, bringing to mind the Rule Against Perpetuities. Although the rule surely does not apply in this context, common sense should.

Even though the transfer itself is not complete, the certainty of the governmental action taking place is sufficiently ripe to allow review. *See, e.g., Friedman*, 676 F.2d at 1318-19 (concluding that challenge to agency's action as violating National Environmental Policy Act was ripe where agency had granted funds for project and exempted it from certain of NEPA's requirements, despite that formal action to acquire the subject property by condemnation had not yet commenced). Thus,

none of the prudential ripeness concerns weigh against our rendering a decision.[11]

II. Violation of the Permanent Injunction

We next address whether the district court abused its discretion in concluding that "transfer of the Preserve land containing the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion' . . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock." *Buono III*, 364 F. Supp. 2d at 1182 (citation omitted).

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[11] The government raises, for the first time on appeal, a second challenge under the guise of "ripeness." It argues that the district court exceeded its power by issuing a second injunction in the face the government's effort to comply with the original injunction. This is not a true ripeness consideration, but a challenge to the propriety of the district court's exercise of its equitable power to enforce its prior injunction. Because this issue is not one of justiciability or jurisdiction, the government waived the argument by failing to challenge the scope of the district court's action before that court. *See, e.g., Ritchie v. United States*, 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised). Even assuming no waiver, the district court acted within its broad equitable powers to enforce its prior injunction. *See, e.g., Ellis v. City of La Mesa*, 990 F.2d 1518, 1530-31 (9th Cir. 1993) (per curiam) (noting, in dispute over religious symbols on public land, that in light of changed circumstances of ownership of land (or a planned change in ownership), district court has broad equitable powers "to modify, fashion or enforce appropriate equitable relief" in assessing compliance with its prior injunction).

A. GOVERNMENT ACTION

In *Buono II*, we noted that "the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause." *Buono II*, 371 F.3d at 546 (citing *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000)).[12] But we left for another day the question of "whether a transfer completed under section 8121 would pass constitutional muster." *Id.* In considering that question, we examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased. *See Marshfield*, 203 F.3d at 491.[13]

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[12] In *Marshfield*, it was undisputed that a white, marble, fifteen-foot statue of Jesus Christ situated on city park land violated the Establishment Clause. *Id.* at 489. To remedy the violation, the city sold the statue and a small parcel of land (0.15 acres) beneath the statue to a private organization that agreed to maintain the land and the statue, including paying for the electrical service used to light the statue. *Id.* at 490. After concluding that the sale properly ended the government action with respect to the statue and the property, the court determined that the statue's presence still violated the Establishment Clause. *Id.* at 495. Based on the historic association of the land with the public park, the dedication of the land to use as a public park through a restrictive covenant, and the physical location and visual perception of the now-private property within the public park, the court concluded that a reasonable observer would perceive that the statue was on city park property and that it "constitute[d] a City endorsement of religion." *Id.* at 495-96.

[13] The Seventh Circuit stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491. Read as a whole, the

As did the district court, based on the circumstances of this case, we consider three aspects of the land exchange under § 8121: (1) the government's continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government's efforts to preserve the cross.

Seventh Circuit position looks at the issue on a transaction-by-transaction basis. We agree with this approach. However, to the extent that *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area. *Compare McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 884-85, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (holding unconstitutional postings of Ten Commandments at county courthouses on the basis that counties' purpose in erecting displays demonstrated impermissible governmental endorsement of religion), *with Van Orden v. Perry*, 545 U.S. 677, 700, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (upholding "passive monument" inscribed with Ten Commandments on Texas State Capitol grounds based on analysis of monument's and nation's history) (Rehnquist, C.J.) (plurality opinion). *See also Van Orden*, 545 U.S. at 685 nn.4 & 5, 125 S. Ct. 2854 (citing cases under the Establishment Clause over the preceding 25 years of Supreme Court jurisprudence). Moreover, the "public function" cases discussed in *Marshfield* suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands. *Evans v. Newton*, 382 U.S. 296, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) ("[W]here the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."); *Terry v. Adams*, 345 U.S. 461, 469, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (lack of formal public control over election primary "immaterial" to analysis of constitutional violation).

1. Continuing Government Oversight and Control Over the Cross and Preserve Property

Although Congress sought to transfer the property to the VFW, a private entity, the various statutes, when read as a package, evince continuing government control. The following summary highlights that control:

- NPS retains overall management and supervision of the Preserve.
- NPS is responsible for "the supervision, management, and control" of national memorials.
- The "five-foot-tall white cross" in the Mojave National Preserve is designated as a "national memorial."
- The transfer of land to the VFW is conditioned on the VFW's maintenance of the conveyed property as a memorial to World War I veterans.
- The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque.
- The property "shall revert" to government ownership if "it is no longer being maintained as a war memorial."

The government retains various rights of control over the cross and the property. NPS is granted statutory powers of "supervision, management, and control" of national memorials. *See* 16 U.S.C. §§ 2, 431. Thus, NPS's general supervisory and managerial responsibilities with respect to the cross remain, despite a land transfer. *See, e.g.*, 16 U.S.C. § 1 (providing that the new-

ly created NPS is responsible for regulating and promoting "national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose" of conservation); 16 U.S.C. § 3 ("The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of [NPS].").[14]

In addition, § 8121(a) expressly reserves NPS's management responsibilities under § 8137. *See* § 8121(a) ("Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137."). Section 8137 not only designates the cross a national memorial, but provides for $10,000 in funds for NPS to acquire and install replicas of the original plaque and cross located at the site. *See* § 8137(a)-(c). The district court found that these provisions gave the government an easement or license over the subject property for this particular purpose. *Buono III*, 364 F. Supp. 2d at 1180. Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements on that land. *See, e.g., First Unitarian Church of Salt Lake v. Salt Lake*, 308 F.3d 1114, 1122 (10th Cir. 2002) (holding that where the government sells land to a private religious organization but maintains a pedestrian easement on the land, the First Amendment speech clause applies even though the private party holds title to the land).

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[14] The government does not dispute that the Preserve is under NPS's jurisdiction as a unit of the national park system. *See* 16 U.S.C. §§ 1(c), 410*aaa*—41, 410*aaa*—42, 410aaa—46.

The district court also focused on the significance of the government's retention of a reversionary interest in the property under § 8121(e). *See Hampton v. City of Jacksonville*, 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that the inclusion of a reversionary clause in deeds to segregated golf courses conveyed by the city to private parties was sufficient state action to bring the golf courses within the Fourteenth Amendment because the reversionary clauses allowed the city to exercise "complete present control" over the golf courses); *Eaton v. Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964) (holding that a reverter clause in a deed of trust allowed the city to effectively exercise control of the facility to ensure that it was always used "as a hospital," and that such ongoing city control over use of property constituted sufficient state action to subject the hospital to the Fourteenth Amendment's prohibitions against racial discrimination). As in *Hampton* and *Eaton*, the reversionary clause in § 8121(e) results in ongoing government control over the subject property, even after the transfer.

Although the government argues that reversionary interests are run-of-the mill clauses in contracts with the government, the commonality of such clauses does not diminish their power or effect. The fact remains that the government has an *automatic* reversionary interest in the property if it determines that the property is no longer being used as a "war memorial," which, at this juncture, is the cross itself. *See* § 8137. *See also Buono II*, 371 F.3d at 546 (noting the importance of the government's reversionary interest, and various other mechanisms by which the government can acquire public lands, in concluding that the dispute had not been rendered moot by passage of § 8121).

As it did with respect to ripeness, the government argues that the court must await exercise of the reversionary interest before determining whether it is a real factor in government control over the property. We reiterate the import of the reversionary interest; it shows the government's ongoing control over the property and that the parties will conduct themselves in the shadow of that control. The courts in *Hampton* and *Eaton* found dispositive the ongoing control resulting from the reversionary interest; their analysis is persuasive here.

Based on the government's ongoing supervisory, maintenance and oversight responsibilities with respect to the cross and the property, coupled with the reversionary interest, the district court found that the government retains important property rights in, and "will continue to exercise substantial control over," the property on which Sunrise Rock is located, even after the land exchange. *Id.* at 1179. The government has failed to show that this determination is either clearly erroneous or an abuse of discretion.

2. METHOD FOR EFFECTUATING THE LAND EXCHANGE

Next, we examine the method of sale by which § 8121 transfers the property to a private buyer outside the normal NPS procedures for transfer of parklands. The Secretary of DOI is authorized to exchange federal land for non-federal land under its jurisdiction. *See* 16 U.S.C. § 460*l*—22(b); *see also* § 410*aaa* 56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange"). In this case, however, the decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting

such exchange. *E.g.*, *id.* § 460*l*—22(b) (providing that upon request, "prior to such exchange the Secretary . . . shall hold a public hearing in the area where the lands to be exchanged are located"). Nor did the government open bidding to the general public. *E.g.*, *id.* § 460*l*—22(a). Rather, § 8121 directs that the land be transferred to the VFW, the organization that originally installed a cross on Sunrise Rock some years ago and desires the continued presence of the current cross in the Preserve. The private land being exchanged for the federal property is owned by the Sandozes, who constructed the present cross and who have actively sought to keep the cross on Sunrise Rock. *Buono III*, 364 F. Supp. 2d at 1180.

The government argues that, of all parties, the VFW is the "logical purchaser" because it originally erected the cross at the site more than seventy years ago. The government cites *Marshfield* and another Seventh Circuit case, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). In both cases, the respective courts upheld the sale of property to a private party without an open market bidding process for the land. *Marshfield*, 203 F.3d at 489-90; *Mercier*, 395 F.3d at 694-95, 702-03.

Although neither the exclusion of other purchasers, nor the fact that Congress acted outside the scope of normal agency procedures for disposing of federal park land is dispositive, both acts demonstrate the government's unusual involvement in this transaction. These facts, coupled with the government's selection of beneficiaries of the land exchange who have a significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunc-

tion in this case. We see no basis to upset the district court's conclusion that the VFW was a straw purchaser. *Id.* at 1181.

3. History of the Government's Preservation Efforts

Finally, the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock lead us to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place. In brief, when litigation was first threatened against NPS, Congress banned the use of government funds to remove the cross (§ 133), the first step in forestalling inevitable enforcement of a federal injunction. After litigation commenced, Congress designated the cross and adjoining Preserve property as a national memorial commemorating World War I (§ 8137). Congress also appropriated up to $10,000 for NPS to acquire replicas of the original cross and plaque at the site (*id.*), once more trying to bolster the presence of the cross. Once the district court enjoined display of the cross in *Buono I*, Congress again prohibited the use of federal funds to remove any World War I memorials (which, obviously, includes the cross) (§ 8056(b)); and, while the appeal was pending in *Buono II*, Congress enacted § 8121, directing the transfer of the subject property to a private organization, but maintaining effective government control over the memorial and the use of that property.

The government does not contest these legislative responses to various stages of the litigation in this case, or their purpose aimed at preserving the cross. Rather, the government attempts to diminish their importance. For example, the government argues that § 8137(c),

which earmarks funds for the replica plaque and cross, was passed before the district court's injunction and that after the injunction, DOI has taken no action to acquire the replicas. While this may be true, when Congress enacted § 8121, it specifically incorporated the Secretary's duty to carry out the responsibilities set out in § 8137; Congress did not repeal the funding provisions, or any other provision permitting ongoing government control. The funding provisions offer historical evidence of the governmental responses aimed at preserving the cross, as well as ongoing legislative authorizations. In that context, it does not matter whether DOI has exercised its powers to obtain such replicas; the important fact is that Congress directed that it do so, further showing its intent to preserve and maintain the cross.

We agree with the district court that the government engaged in "herculean efforts" to preserve the cross atop Sunrise Rock. *Buono III*, 364 F. Supp. 2d at 1182. We also agree that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.*

B. Continuing Governmental Endorsement of Religion

Our inquiry into a purported cure of an Establishment Clause violation must also analyze whether the improper governmental endorsement of religion has ceased. *See, e.g., Marshfield*, 203 F.3d at 493-96. Because of the procedural posture of this case, we have necessarily already considered that question. We previously held that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono II*, 371 F.3d at 548-50. We also concluded that a reasonable

observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. *Id.* at 550. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately-owned land in the Preserve." *Id.* Nothing in the present posture of the case alters those earlier conclusions. Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement. Nor does the proposed land exchange under § 8121 end the improper government action. Such a transfer cannot be validly executed without running afoul of the injunction.

In sum, the government has not shown the district court's factual findings to be clearly erroneous. Nor has the government shown that the district court applied erroneous legal standards. Finally, the district court's decision does not reflect any clear error of judgment. The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under § 8121 and ordering the government to otherwise comply with its prior injunction that it not permit the display of the Sunrise Rock cross in the Preserve.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

No. EDCV 01-216RTSGLX

FRANK BUONO, PLAINTIFF

v.

GALE NORTON, JONATHAN JARVIS, AND MARY MARTIN, DEFENDANTS

Dated: Apr. 8, 2005

ORDER 1) GRANTING PLAINTIFF'S MOTION TO ENFORCE PERMANENT INJUNCTION, 2) DENYING PLAINTIFF'S MOTION TO MODIFY THE INJUNCTION AS MOOT, AND 3) PERMANENTLY ENJOINING DEFENDANTS' IMPLEMENTATION OF THE PROVISION OF SECTION 8121 OF PUBLIC LAW 108—87

TIMLIN, District Judge.

The court, Judge Robert J. Timlin, has read and considered plaintiff Frank Buono ("Plaintiff")'s motion to enforce or, in the alternative, modify the permanent injunction ("motion"), defendants Gale Norton, Secretary of the Interior, Jonathan Jarvis, Regional Director of the Pacific West Region of the Department of Interior,

and Mary Martin, Superintendent of the Mojave Desert Preserve (collectively, "Defendants")' response,[1] and Plaintiff's reply.[2] Based on such consideration, the court concludes as follows:

I.

BACKGROUND

On July 24, 2002, this court held that a Latin cross situated upon a prominent rock on federal land in the Mojave National Preserve ("the Preserve"), which the government[3] had designated as a national monument for World War I veterans during this litigation, violated the Establishment Clause of the First Amendment. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002). The court entered a judgment that "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

Defendants appealed to the Ninth Circuit Court of Appeals ("Ninth Circuit"), which stayed this court's order "permanently enjoining display of the cross to the extent that the order required the immediate removal or dismantling of the cross" but "did not stay alternative

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[1] Defendants are only being sued in their official capacities.

[2] The notice of motion stated "Plaintiffs" were bringing this motion, but it appears from footnote 3 of Plaintiff's points and authorities that plaintiff Allen Schwartz died before the motion was filed. Consequently, the court will use the language "Plaintiff," which refers only to Frank Buono.

[3] For the purposes of this order, "the government" refers to the executive and legislative branches of the federal government.

methods of compliance with" the order. *Buono v. Norton*, 371 F.3d 543, 545 n.1 (9th Cir. 2004). During the pendency of appeal, the Department of Interior covered the cross first with a tarpaulin secured by a lock and later with a large plywood box. The Ninth Circuit affirmed this court's judgment on June 7, 2004. *Id.* at 550. The cross remains covered by the box.

Prior to the Ninth Circuit's decision, Congress passed, and the President signed, the Department of Defense Appropriations Act of 2004 ("DDAA"), Pub. L. No. 108—87, 117 Stat. 1054 (2003). Section 8121 of the DDAA ("Section 8121") "requires the Secretary of the Interior to transfer the land on which the cross sits to the local Veterans of Foreign Wars Post in exchange for a privately-owned five-acre parcel elsewhere in the Preserve." *Buono*, 371 F.3d at 545. The Ninth Circuit held that Section 8121 did not moot the appeal, but left "for another day" the question "whether a transfer completed under Section 8121 would pass constitutional muster." *Id.*

For this court, that day is today. Plaintiff has brought a motion requesting that the court "either hold that the transfer violates the current injunction, or modify that injunction to prohibit the land transfer because it violates the Establishment Clause."

II.

ANALYSIS

A. Defendants' Requests for Delay

Defendants request that this court delay ruling on Plaintiff's motion until the Supreme Court provides additional guidance in two pending cases involving displays of the Ten Commandments on public property. *See Van*

Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), *cert granted*, __ U.S. __, 125 S. Ct. 346, 160 L. Ed. 2d 220 (2004) (No. 03-1500); *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, __ U.S. __, 125 S. Ct. 310, 160 L. Ed. 2d 221 (2004) (No. 03-1693). These cases are inapposite to the instant motion because the issue here is not whether the display of the Latin cross on federal land violates the Establishment Clause. Both this court and the Ninth Circuit answered that question in the affirmative. *Buono*, 212 F. Supp. 2d at 1217; *Buono*, 371 F.3d at 550. Rather, the issue is whether the land transfer directed by Section 8121 violates the permanent injunction or is itself an unconstitutional violation of the First Amendment Establishment Clause. Moreover, as Plaintiff points out, if this court were to delay ruling on Plaintiff's motion each time the Supreme Court grants certiorari on an Establishment Clause case, this motion will never be finally resolved.

Defendants also request that this court postpone ruling on this motion for the "additional six months to two years" that it will take them to complete the land transfer. Section 8121, which was passed on September 30, 2003, expressly requires the Secretary of the Interior to undertake the land transfer. There is no doubt that the land transfer will go forward and, according to the government, it is already in progress. The court has examined Section 8121 and concludes that it provides sufficient information from which to determine whether the land transfer is a bona fide attempt to cure Defendants' violation of the Establishment Clause by maintaining the Latin cross on Preserve land or an improper attempt to evade the permanent injunction. As a consequence, the court does not need to delay its decision to

allow for the administrative tasks necessary for the completion of a potentially invalid land transfer.

B. Validity of Land Transfer

Plaintiff contends that the land transfer directed by Section 8121 is a sham by Defendants to preserve the Latin cross in the Preserve. Defendants contend that the transfer of the land on which the cross stands to private ownership will remedy the Establishment Clause violation.

The Seventh Circuit Court of Appeals ("Seventh Circuit") has held that, "[a]bsent unusual circumstances," the sale of public property containing an unconstitutional religious display "is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc. v. City of Marshfield, Wisconsin*, 203 F.3d 487, 491, 492 (7th Cir. 2000) (holding that the sale of 0.15 acres of city park land containing a statute of Jesus Christ to a private organization "validly extinguished any government endorsement of religion" because there were not unusual circumstances);[4] *see also Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702-04 (7th Cir. 2005) (holding that the sale of 440 square feet of a city park containing a Ten Commandments monument to a private organization was valid because there were no unusual circumstances). Since "adherence to a formalistic standard invites manipulation," a court must "look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually

[4] The display was still unconstitutional in that case because the private organization's land was "visually indistinguishable" from the city's land. *Id.* at 495.

ceased." *Freedom from Religion Found., Inc.*, 203 F.3d at 491.

Unusual circumstances that will invalidate a sale include (1) "a sale to a straw purchaser" leaving the public entity "with continuing power to exercise the duties of ownership," (2) a sale that does not comply with applicable law governing the sale of land by a public entity, or (3) "a sale well below fair market value resulting in a gift to a religious organization." *Mercier*, 395 F.3d at 702; *see also Freedom from Religion Found., Inc.*, 203 F.3d at 492. All of these unusual circumstances need not exist to invalidate a sale and a court may also consider the existence of other unusual circumstances in this analysis. *See Mercier*, 395 F.3d at 702, 703-04.

The court finds this analytical framework helpful and will apply it to the proposed Section 8121 mandated land transfer in the instant case. The pertinent question is whether the transfer of the acre of federal land on Sunrise Rock in the Preserve containing the Latin cross to the Veterans of Foreign War ("VFW") in exchange for other private land in the Preserve presumably owned by Mr. and Mrs. Henry Sandoz is characterized by any unusual circumstances. In particular, the court will examine the circumstances surrounding the government's retaining certain property rights over the site containing the cross ("subject property") after the proposed transfer, the method for effectuating the land transfer, and the history of the government's efforts to prevent the removal of the Latin cross.[5]

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[5] Section 8121(c) requires that "[t]he value of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d)," which provides for a "cash equalization payment" should one of the properties be appraised at a higher value than the

1. Continuing Property Rights in the Subject Property

It is clear from Section 8121 and its various subdivisions that, despite the transfer, the government will retain important property rights in the subject property and will continue to exercise substantial control over the property. Section 8121(e) legislates a reversionary clause in the property exchange transaction, providing that the transfer will be "subject to the condition that the recipient maintain the conveyed property as a" World War I memorial and that "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." In effect, the government has tightly restricted the VFW's use of the subject property for one purpose and, more importantly, has reserved the right to reassert ownership and repossess the subject property any time the Secretary of the Interior makes the discretionary determination that the VFW is not adequately maintaining the Latin cross as a World War I memorial. Such a reversionary clause defeats Defendants' contention that the government has given up control over the subject property. *See Hampton v. City of Jacksonville*, 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that where the city's conveyance of a segregated golf course to private parties included a rever-

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other. Although it is somewhat strange for the government to exchange one acre on Sunrise Rock for five acres elsewhere in the Preserve, which suggests, as Plaintiff contends, that the five acres are less desirable, the cash equalization provision negates any threat that the government will be giving the land to the VFW "well below fair market value." *Mercier*, 395 F.3d at 702. As noted above, however, the absence of one unusual circumstance does not negate the existence of the other unusual circumstances discussed *infra*.

sionary clause, which provided that the city could retake the property if it were no longer used for a golf course, the city had "complete present control" over the golf course and state action existed under the Fourteenth Amendment); *see also Downs v. Sawtelle*, 574 F.2d 1, 8 (1st Cir. 1978); *Eaton v. Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964).

Furthermore, Section 8121(a) provides that "[n]otwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under" Section 8137 of the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act of 2002 ("Supplemental Appropriations Act"), Pub. L. No. 107—117, 115 Stat. 2230 (2002). Section 8137 of the Supplemental Appropriations Act designated the Latin cross on the subject property as a national World War I monument and required the Secretary of the Interior "to acquire a replica of the original memorial plaque and cross"[6] with "not more than $10,000 of funds available for the administration of the Mojave National Preserve" and "to install the plaque in a suitable location on the grounds of the memorial," thus giving the Secretary access to the subject property in the form of an easement or license for a particular purpose.

The designation of the Latin cross in the Preserve as a sectarian memorial by the government, as well as the government's use of $10,000 of federal funds to put a new plaque on Sunrise Rock and acquire a replica of the original cross, demonstrate that the government is in-

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[6] The cross had first been erected in 1934 by the VFW as a memorial for World War I.

tent on preserving the Latin cross, the primary symbol of Christianity, in the Preserve. The government's direction that the Secretary of the Interior continue to carry out her responsibilities under Section 8137 of the Supplemental Appropriations Act in spite of the land transfer, as required by Section 8121(a), and the reversionary clause authorized in Section 8121(e), compel the conclusion that the government reserved its rights to remain actively involved with the Latin cross, even though the VFW has ownership of the subject property.

Given the government's continuing control over the Latin cross, it is significant that the subject property, including the Latin cross, is being transferred to the organization (VFW) that originally installed the cross and desires its continued presence in the Preserve, and that the private land being exchanged for the federal property is owned by a couple (Mr. and Mrs. Sandoz) who has actively sought to keep the Latin cross on Sunrise Rock. The direct land transfer to the VFW "to the exclusion of any other purchasers of or bidders for the land," *Murphy v. Bilbray*, 1997 WL 754604, at *11 (S.D. Cal. Sept. 18, 1997), demonstrates that the government's apparent endorsement of a particular religion has not actually ceased. *Cf. Mercier*, 395 F.3d at 702-03 (upholding the sale of 440 square acres of city park land containing a Ten Commandments monument in part because the government had terminated its relationship with the land and transferred "the traditional duties of ownership" to a private organization).[7] The court can

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[7] In *Mercier*, 395 F.3d at 702-04, the Seventh Circuit in upholding the sale to a private organization of the city park land containing the Ten Commandments monument found it important that there was a "somewhat extensive effort made to distinguish the now-private property

only conclude that, under these circumstances, the VFW is "a straw purchaser." *Id.* at 702.

2. Compliance with Applicable Law

Another unusual circumstance in this case is the nature of the proposed transfer of the subject property. Under normal circumstances, the transfer of land over which the National Park Service ("NPS") has jurisdiction takes place pursuant to 16 U.S.C. § 4601—22(b) ("Section 4601—22(b)"), which gives the Secretary of the Interior authority to exchange federal land for non-federal land. Here, however, the land transfer decision did not occur through the normal administrative process by which the Secretary of the Interior exercises her discretion pursuant to Section 4601—22(b). Instead, the land transfer decision was made directly by the government and authorized by a provision buried in a defense appro-

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from the Park." While in *Mercier* "[a]ny reasonable person walking past the Monument" would "quickly recognize" that it is not on city property because of the two fences surrounding it and the six signs disclaiming any endorsement of it by the city, *id.* at 703-04, our case is distinguishable. The Latin cross atop Sunset rock "is visible to vehicles traveling on the road from a distance of approximately 100 yards," *Buono*, 212 F. Supp. 2d at 1205, and it is not clear how any fences and sign disclaimers like those in *Mercier* would prompt reasonable drivers viewing the cross from afar to "quickly recognize" that, unlike the surrounding 1.6 million acres, the one acre containing the cross was actually private land. *See Murphy*, 1997 WL 754604, at *11 (invalidating the city's first attempt to sell to a private organization 222 square feet of land containing a cross atop Mt. Soledad, which the Ninth Circuit held to violate the No Preference Clause of the California Constitution in a previous case, in part because visitors would not be able to differentiate that "small plot of land" from the "approximately 170 acres of municipally owned and maintained park land" despite the existence of "a small disclaimer plaque").

priations bill. While not dispositive by itself, this unusual circumstance adds support to Plaintiff's contention that the government is seeking to evade this court's injunction with the land transfer. *Cf. Freedom from Religion Found., Inc.*, 203 F.3d at 492 (finding no unusual circumstances where the sale of 0.15 acres of city park land containing a statute of Jesus Christ "complied with the applicable Wisconsin law governing the sale of land by municipalities").

3. History of the Government's Preservation Efforts

The history of the government's efforts to preserve and maintain the Latin cross on the subject property is yet another unusual circumstance in this case. *See Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (examining the history of the school board's policy of prayer at football games to determine whether the purpose of its current policy of allowing student-initiated prayer at football games "was to preserve a popular 'state-sponsored religious practice.'") (*quoting Lee v. Weisman*, 505 U.S. 577, 596, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)).

In 2000, after the American Civil Liberties Union threatened to sue to remove the Latin cross, Congress passed, and the President signed, the Consolidated Appropriations Act, Pub. L. No. 106—554, 114 Stat. 2763 (2000), which included a provision, Section 133, that prevented the use of any federal funds for the removal of the Latin cross. Then, in early 2002, Congress passed, and the President signed, the Supplemental Appropriations Act, which contained a provision, Section 8137, designating the subject property, including the Latin cross, as a national World War I monument and appropriating up to $10,000 in federal funds to obtain a replica

of the original cross and original plaque that were placed on the land in 1934, and to install the plaque on the property. Later in 2002, after this court had enjoined the display of the Latin cross, Congress passed, and the President signed, the Department of Defense Appropriations Act of 2003, Pub. L. No. 107—248, 116 Stat. 1519 (2002), which had a provision, Section 8056(b), that prohibited the use of federal funds to dismantle any World War I memorials. Then, while the case was on appeal to the Ninth Circuit, Congress passed, and the President signed, the DDAA, which included Section 8121 directing the transfer of the subject property to a private organization but maintaining effective government control over the use of that property by requiring the Latin cross to remain thereon.

In light of this history, it is evident to the court that the government has engaged in herculean efforts to preserve the Latin Cross on federal land and that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants. The court finds that Section 8121 and its pertinent subdivisions regarding a transfer of the subject property by Defendants to the VFW violates this court's judgment ordering a permanent injunction.

4. Remedy

Having considered the aforementioned unusual circumstances, the court concludes that the transfer of the Preserve land containing the Latin Cross, which as "[a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion," *Ellis v.*

City of La Mesa, 990 F.2d 1518, 1527 (9th Cir. 1993), is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock. As a result, the court concludes that the proposed transfer of the subject property to the VFW is invalid. *See Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (en banc) (invalidating the city's second attempt to sell to a private organization 0.509 acres of land containing a cross on Mt. Soledad, which the Ninth Circuit held to violate the No Preference Clause of the California Constitution in a previous case, because the city's bidding process had the effect of skewing the outcome of the sale in favor of sectarian organizations).[8]

The court will therefore grant Plaintiff's motion to enforce the permanent injunction and deny Plaintiff's alternative motion to amend the injunction as moot.

III.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

1) Plaintiff Frank Buono's motion to enforce the permanent injunction is GRANTED;

2) Plaintiff Frank Buono's motion to amend the permanent injunction is DENIED as moot;

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[8] Since the court has found that the proposed transfer is an unlawful attempt to evade the permanent injunction, it need not consider Plaintiff's other contention that the land transfer itself is an independent violation of the Establishment Clause.

3) Defendants Gale Norton, Jonathan Jarvis, and Mary Martin, their agents, employees, successors, assignees, or anyone acting in concert with them are permanently enjoined from implementing the provisions of Section 8121 of Public Law 108—87; and

4) Defendants Gale Norton, Jonathan Jarvis, and Mary Martin are hereby ordered to comply forthwith with the judgment and permanent injunction entered by this court on July 24, 2002.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55032

FRANK BUONO; ALLEN SCHWARTZ,
PLAINTIFFS-APPELLEES

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JONATHAN JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY,* MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY,
DEFENDANTS-APPELLANTS

Argued and Submitted: Aug. 6, 2003
Filed: June 7, 2004

Before KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI, Judge.**

KOZINSKI, Circuit Judge:

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* Jarvis is substituted for his predecessor, John J. Reynolds, former Regional Director of the Pacific West Region of the Department of the Interior. See Fed. R. App. P. 43(c)(2).

** The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Plaintiffs claim that the presence of a Latin cross on federally-owned land in the Mojave National Preserve, which is managed by the National Park Service, violates the Establishment Clause. A Latin cross "has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002). The Latin cross "is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Id.*; *see also Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993). The cross at issue is constructed of four-inch-diameter metal pipe and painted white. It sits in an area of the Preserve known as Sunrise Rock, adjacent to Cima Road, a secondary road roughly eleven miles from the I-15 in San Bernardino County, California.

Plaintiffs sued the Secretary of the Interior, the Regional Director of the National Park Service and the Superintendent of the Preserve, seeking removal of the cross. The district court granted summary judgment for plaintiffs and enjoined defendants from allowing continued display of the cross. Defendants appeal. We review the grant of summary judgment de novo. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003).[1]

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[1] We stayed the district court's order permanently enjoining display of the cross to the extent that the order required the immediate removal or dismantling of the cross. We did not stay alternative methods of compliance with, or additional obligations imposed by, the district court's order. *Buono v. Norton*, No. 03-55032, 2003 WL 22724262 (9th Cir. May 15, 2003) (order granting motion to stay); *Buono v. Norton*, No. 03-55032, 2003 WL 22724265 (9th Cir. June 6, 2003) (clarifying May 19 order). The Department of the Interior has covered the cross.

1. Since we heard oral argument, Congress passed the Department of Defense Appropriations Act of 2004 (DDAA), Pub. L. No. 108—87, 117 Stat. 1054 (2003). Section 8121 of the DDAA requires the Secretary of the Interior to transfer the land on which the cross sits to the local Veterans of Foreign Wars Post in exchange for a privately-owned five-acre parcel elsewhere in the Preserve. Section 8121(a) further provides that, "[n]otwithstanding the conveyance of the property . . . , the Secretary [of the Interior] shall continue to carry out the responsibilities of the Secretary under section 8137" of the Department of Defense and Emergency Supplemental Appropriations Act of 2002, Pub. L. No. 107—117, 115 Stat. 2230 (2002), which had designated the cross a war memorial. Section 8137(c) in turn directs the Secretary to "use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial . . . and to install the plaque in a suitable location on the grounds of the memorial." Finally, the DDAA provides that if the "property is no longer being maintained as a war memorial," the property shall revert to the United States. § 8121(c).

Defendants urge that, "[g]iven the *impending* mootness of this case, the Court should avoid deciding the constitutional issues raised here." Supplemental Mem. of Appellants at 4 (emphasis added). We are not convinced. This case is not yet moot and may not be for a

significant time, as defendants concede that the land transfer could take as long as two years to complete.[2]

Even if the transfer were already completed, defendants have not carried their burden of showing that "(1) subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur, *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (internal quotation marks and citations omitted; alterations in original). "'Mere voluntary cessation of allegedly illegal conduct does not moot a case.'" *Id.* (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). As discussed, section 8121(c) of the DDAA provides that the land may revert to the federal government. Further, not only is there nothing in section 8121 that prevents the land from being otherwise returned to the government, federal law contemplates just such a transfer. *See* 16 U.S.C. § 431 ("When such [national monuments] are situated upon a tract . . . held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United

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[2] So far, the Bureau of Land Management has completed a survey and legal description of the cross site as the first step toward the land transfer.

States."); *see also id.* § 410aaa—56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the[Mojave] preserve by donation, purchase, or exchange").

Finally, we note that the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause. *See Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000) (as amended on denial of rehearing and rehearing en banc). We express no view as to whether a transfer completed under section 8121 would pass constitutional muster, but leave this question for another day. *See Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 620 n.5 (9th Cir. 1996) (per curiam).

2. Defendants claim that plaintiffs Frank Buono and Allen Schwartz lack standing. To have standing, a plaintiff "must have suffered an injury in fact" that is "fairly traceable" to the challenged conduct, and "it must be likely that the injury would be redressed by a favorable decision." *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The district court concluded that plaintiffs have standing; we review de novo. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

The district court found that Buono is a retired employee of the Park Service who previously served as Assistant Superintendent of the Preserve. He "now lives in Oregon" but "regularly visits the Preserve." *Buono*, 212 F. Supp. 2d at 1207. He "visit[s] the Preserve two to four times a year on average." *Id.* At the time of sum-

mary judgment, "Buono . . . intend[ed] to sell his home in Oregon, to relocate to Southern California or Arizona, and to make more frequent trips to the Preserve." *Id.* The district court further found that:

> Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.

Id.

Defendants argue that Buono has not suffered injury-in-fact. They assert that the offense he experiences in seeing the cross is "ideological, not religious, in nature and, hence, is not cognizable under the Establishment Clause." Appellants' Opening Br. at 12. This distinction is meaningful, they suggest, because "[u]nconstitutional establishments of religion cause harm by sending 'a message to nonadherents that they are outsiders, not full members of the political community.'" *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). They add that Buono did not allege that the presence of the cross at Sunrise Rock made him feel like an outsider. Defendants rely on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), as the source for the purported distinction between ideologically and religiously-based offense. But *Valley Forge* does not support this distinction; instead, it reminds the federal courts that only concrete, personal-

ized injury—not an abstract, generalized grievance—suffices to confer standing.

At issue in *Valley Forge* was a transfer of federal property in Pennsylvania from the government to Valley Forge Christian College, for which the college made no payment. *Id.* at 467-68, 102 S. Ct. 752. Plaintiffs "reside[d] in Maryland and Virginia; their organizational headquarters [we]re located in Washington, D.C. They learned of the transfer through a news release." *Id.* at 487, 102 S. Ct. 752 (footnote omitted). The Court concluded that, under these facts, plaintiffs had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486, 102 S. Ct. 752. Rather, theirs was merely a generalized grievance. *See id.* at 482-86, 102 S. Ct. 752.

Valley Forge nowhere suggests that plaintiffs lacked standing because their offense at the property transfer was grounded in ideological, rather than religious, beliefs. Rather, plaintiffs lacked standing because their sense of offense was unaccompanied by "any personal injury suffered . . . *as a consequence* of the alleged constitutional error." *Id.* at 485, 102 S. Ct. 752. The problem was not the nature of "the psychological consequence" plaintiffs experienced in observing "conduct with which [they] disagree[d]," but the absence of any personal injury at all, economic or non-economic, accompanying it. *Id.* By relying on *Valley Forge*, defendants confuse inquiry into whether the requisite injury-in-fact accompanies offense, with inquiry into the psychological motives giving rise to such offense. The *Valley Forge* Court drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs.

The district court found that "Buono will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." *Buono*, 212 F. Supp. 2d at 1207. Buono is, in other words, unable to "freely us[e]" the area of the Preserve around the cross because of the government's allegedly unconstitutional actions. *SCSC*, 93 F.3d at 619 n.2. We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact. *See id.* (noting that plaintiff organization "is composed of local citizens who have standing to bring this challenge because they alleged that the cross prevented them from freely using the area on and around" the location of the cross); *see also Ellis*, 990 F.2d at 1523; *Hewitt v. Joyner*, 940 F.2d 1561, 1564-65 (9th Cir. 1991). Such inhibition constitutes "personal injury suffered . . . *as a consequence* of the alleged constitutional error," beyond simply "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485, 102 S. Ct. 752. Moreover, we have so held even as to plaintiffs who, like Buono, are members of religious sects but nonetheless are offended by religious displays on government property. *See Ellis*, 990 F.2d at 1523 (plaintiffs with standing included members of Catholic and Episcopalian faiths). Buono has therefore alleged injury-in-fact sufficient to confer standing.[3]

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[3] Plaintiff Schwartz, a Jewish veteran, never visited the Preserve or saw the cross until he decided to join this case as a plaintiff. The district court found that Schwartz "is not offended or injured by the sight of the cross, only by the fact that the land on which it rests is federally owned." *Buono*, 212 F. Supp. 2d at 1208. Schwartz asserts that he "intends to visit the cross area regularly during his trips to Las Vegas be-

3. Defendants argue on the merits that display of the cross at Sunrise Rock does not violate the Establishment Clause. The district court concluded that "the primary effect of the presence of the cross" was to "advance[ ] religion." *Buono*, 212 F. Supp. 2d at 1215. We review de novo whether the Establishment Clause was violated. *Int'l Ass'n of Machinists, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 167 (9th Cir. 1987).

This case is squarely controlled by *Separation of Church & State Committee v. City of Eugene*. In *SCSC*, plaintiffs alleged that a "fifty-one foot concrete Latin cross with neon inset tubing," located at the crest of a hill in a city park, violated the Establishment Clause. 93 F.3d at 618. "From the late 1930s to 1964, private individuals [had] erected a succession of wooden crosses in the park, one replacing another as they deteriorated. In 1964, private individuals erected the cross at issue" in *SCSC*. *Id.* In 1970, the cross was designated as a war memorial and deeded to the City of Eugene; "a bronze plaque was placed at the foot of the cross dedicating it as a memorial to [all] war veterans." *Id.* at 618-19. Be-

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cause he finds the presence of the cross on government land offensive. He will go to see if it has been taken down." *Id.* at 1209. Defendants contend that Schwartz lacks standing because, like Buono, he does not allege sufficient injury and because he subjected himself to his alleged harm by seeking out the cross.

Because we hold that Buono has standing, we need not also evaluate Schwartz's standing. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977))).

ginning that year, the City of Eugene "illuminated the cross" during the Christmas and Thanksgiving seasons, as well as "on Memorial Day, Independence Day, and Veteran's Day." *Id.* at 618. Considering both the effects prong of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971), and the endorsement test from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), we held that "[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity." *SCSC*, 93 F.3d at 620.

Similarly here, the cross at Sunrise Rock sits on publicly-owned land, and both it and its predecessors were privately erected. A cross was first placed on the site in 1934 by the Veterans of Foreign Wars, in memory of veterans who died during World War I; a plaque near the original cross identified it as a war memorial. Private parties have since replaced the original cross several times. Easter Sunrise services have been held at Sunrise Rock since at least 1935. The Park Service has not opened the cross site to other permanent displays, nor are there other displays, religious or otherwise, in the area. In 1999, the Park Service denied a third-party request to erect a Buddhist stupa near the cross.[4] Although there is currently no plaque or sign indicating as

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[4] A stupa is a "hemispherical or cylindrical mound or tower, artificially constructed of earth, brick, or stone, containing a relic chamber and surmounted by a spire or umbrella; esp., a Buddhist mound forming a memorial shrine of the Buddha." Webster's New International Dictionary 2504 (2d ed. 1939).

much,[5] recent legislation designated the Sunrise Rock cross as a federal war memorial for World War I veterans. *See* Department of Defense and Emergency Supplemental Appropriations Act § 8137. Federal law prohibits the Park Service from spending money to remove the cross. *See* Department of Defense Appropriations Act of 2003, Pub. L. No. 107—248, § 8065(b), 116 Stat. 1519 (2002) (prohibiting the use of funds to dismantle World War I memorials); Consolidated Appropriations Act of 2001, Pub. L. No. 106—554, § 133, 114 Stat. 2763 (2000) (same as to removal of Sunrise Rock cross).

Defendants seek to distinguish *SCSC* by contrasting the visibility and location of the two crosses. They point out that the *SCSC* cross was fifty-one feet tall, illuminated with neon tubing and located in a city park adjacent to Eugene's downtown business district. By contrast, the Sunrise Rock cross is five to eight feet tall, "is in a remote location, is not projected toward the public, and is not illuminated the way the cross was in *SCSC*." Appellants' Opening Br. at 22. Further, they continue, the "cross at issue here is not in an urban park or adja-

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[5] Defendants assert that the cross "will soon have a new sign [identifying it as a war memorial] . . . that will correct any misperceptions about the purpose and message of the cross." Appellants' Opening Br. at 23. Defendants are mistaken that the presence of such a sign would enhance their position. In *SCSC*, the City of Eugene placed a plaque on the cross in question, identifying it as a war memorial. However, despite the sign—indeed, perhaps because of it—"observers might [still have] reasonably perceive[d] the City's display of such a religious symbol on public property as government endorsement of the Christian faith. Further, the City's use of a cross to memorialize the war dead m[ight have led] observers to believe that the City ha[d] chosen to honor only Christian veterans." *SCSC*, 93 F.3d at 626 (O'Scannlain, J., concurring).

cent to a public building[,] . . . [which are] tangible embodiments of government." *Id.*

These distinctions are of no moment. Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer. *See SCSC*, 93 F.3d at 625 n.11 (O'Scannlain, J., concurring) ("[T]he Establishment Clause focuses on whether the religious display creates an appearance of governmental endorsement of religion. Thus, how few or how many people view the display does not advance the analysis.").

Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.

Defendants further argue that a reasonable observer would not perceive the cross site as public land because of the proximity of two private ranches and several corrals within two miles of the cross. How much information we will impute to a reasonable observer is unclear. Justice O'Connor has suggested that a reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious

display appears," including ownership of the land in question. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring). Under this view, a reasonable observer would know that Sunrise Rock is federally-owned. Even if we assumed a reasonable observer to be less well-informed, *see id.* at 800 n. 5, 115 S.Ct. 2440 (Stevens, J., dissenting), we would still reach the same conclusion. The Mojave National Preserve encompasses 1.6 million acres, over 90 percent of which is federally-owned, and the area where the cross sits is used as a campground. Given the ratio of publicly-owned to privately-owned land in the Preserve and the use to which the Sunrise Rock area is put, a less well-informed reasonable observer would still believe—or at least suspect—that the cross rests on public land.

Finally, defendants suggest that a reasonable observer aware of the history of the cross—such as its placement by private individuals—would believe that the government is not endorsing Christianity by allowing the cross to remain at the site. However, a reasonable observer who is *that* well-informed would know the full history of the cross: that Congress has designated the cross as a war memorial and prohibited the use of funds to remove it, and that the Park Service has denied similar access for expression by an adherent of the 7378 Buddhist faith. "'Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).'" *SCSC*, 93 F.3d at 619 (citation omitted) (quoting *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)).

This case is materially indistinguishable from *SCSC*. Thus, even assuming that the government has a clearly secular purpose in maintaining display of the cross as a war memorial, *see Lemon*, 403 U.S. at 612, 91 S. Ct. 2105, the Sunrise Rock cross violates the Establishment Clause.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. EDCV01216RTSGLX
FRANK BUONO & ALLEN SCHWARTZ, PLAINTIFFS,

v.

GALE NORTON, JOHN REYNOLDS, & MARY MARTIN,
DEFENDANTS

July 24, 2002

ORDER 1) GRANTING PLAINTIFFS FRANK BUONO'S AND ALLEN SCHWARTZ'S MOTION FOR SUMMARY JUDGMENT; AND 2) DENYING DEFENDANTS GALE NORTON'S, JOHN REYNOLDS', AND MARY MARTIN'S MOTION FOR SUMMARY JUDGMENT

TIMLIN, District Judge.

The court, Judge Robert J. Timlin, has read and considered Plaintiffs Frank Buono ("Buono") and Allen Schwartz ("Schwartz") (collectively, "Plaintiffs")'s Motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56 ("Rule 56"); Defendants Gail Norton ("Norton"), John Reynolds ("Reynolds"), and Mary Martin ("Martin") (collectively, "the govern-

ment's"[1] opposition; and Plaintiffs' reply. The court also has read and considered the government's Motion for summary judgment pursuant to Rule 56; Plaintiffs' opposition; and the government's reply. Based on such consideration, the court concludes as follows:

I.

BACKGROUND

Buono filed a Complaint for injunctive and declaratory relief on March 22, 2001, alleging that the government violated his rights under the Establishment Clause of the First Amendment to the United States Constitution. On October 26, 2001, a First Amended Complaint ("FAC") was filed, adding Schwartz as a co-Plaintiff. Both Plaintiffs and the government now move the court for summary judgment.[2]

II.

EVIDENTIARY OBJECTIONS

A. Plaintiffs' Objections to Portion of Martin Declaration Dated March 12, 2002

1. Paragraph 9—overruled.

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[1] The court will refer to Defendants as "the government" because Norton, Secretary of the United States Department of Interior, Reynolds, Regional Director of the Pacific West Region of the National Park Service ("NPS"), and Martin, Superintendent of the Mojave National Preserve ("Preserve"), are sued in their official capacities. The court notes that Reynolds was erroneously sued as the Regional Director of the Pacific West Region of the Department of the Interior.

[2] Because simultaneous cross-motions for summary judgment on the same claim are before the court, the court has considered the appropriate evidentiary material identified and submitted in support of both motions and in opposition to both motions before ruling on each of them.

B. Plaintiffs' Objections to Portions of Buono Deposition Dated December 27, 2001

1. Page 60, lines 10-12; page 61, lines 1-11, 15-20; page 66, lines 14-24, 17-20; page 80, lines 9-19; page 100, lines 8-23; page 101, lines 7-9; page 134, line 21 through page 135, line 1; page 173, lines 12-21-overruled.

2. Page 164, lines 21-25-sustained on the basis of relevance.[3]

3. Page 91, lines 1-9; page 92, lines 2-7, 8-17; page 93, lines 8-18; page 94, line 24 through page 96, line 3-sustained on the basis of relevance.

C. Plaintiffs' Objections to Portions of Schwartz Deposition Dated December 18, 2001

1. Page 21, lines 20-25-overruled

2. Page 37, lines 6-23; page 43, line 20 through page 44, line 9; page 46, lines 9-14; page 47, lines 16-19-sustained on the basis of relevance.

III.

UNCONTROVERTED MATERIAL FACTS

The following are uncontroverted material facts supported by admissible evidence.

A latin cross sits on federal land in the Preserve.

The Preserve is located in the Mojave Desert in southeastern California, between the cities of Barstow, California, and Las Vegas, Nevada. The Preserve lies almost entirely between Interstate 15 ("I-15") to the north and Interstate 40 to the south, starting approxi-

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[3] The court notes that page 164, lines 21-25 does not establish Buono's current residence.

mately 60 miles east of Barstow and extending toward the California-Nevada boundary and U.S. Route 95.

The cross is located on federal land within the Preserve known as Sunrise Rock, approximately 11 miles south of Interstate 15.

Before Congress designated the area as a national preserve, the United States Bureau of Land Management ("BLM"), the NPS's sister agency within the United States Department of Interior ("DOI"), had managed much of the federal desert land, including the area surrounding Sunrise Rock.

The Preserve is now operated by the NPS, a division of the DOI and a federal agency.

The Preserve encompasses approximately 1.6 million acres, or 2500 square miles, of primarily federally owned land in the Mojave Desert. The BLM, another federal agency, transferred the land to the NPS in 1994 as a result of the California Desert Protection Act.

Following the creation of the Preserve in 1994, Marvin Jensen ("Jensen") was appointed as the Preserve's first Superintendent. Buono at that time worked for the NPS and was assigned to the Preserve from January 22, 1995, to December 10, 1995, serving as an Assistant Superintendent for Ecosystem Management. Martin, the Deputy Superintendent, succeeded Jensen as Superintendent in 1995. In 1995, Buono left the Preserve and took a similar position with the NPS at the Joshua Tree National Park. Buono retired from public service in 1997, although he remains active and interested in NPS activities.

Approximately 86,600 acres of private land remain within the Preserve's boundaries. Another 43,000 acres belong to the State of California.

The cross is mounted on the top of a prominent rock outcropping on the north side of Cima Road, a narrow blacktop secondary road that passes through the Preserve.

The cross is visible to vehicles traveling on the road from a distance of approximately 100 yards.

A latin cross has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm.

The latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.

The cross is between five and eight feet tall, and it is bolted into the rock.

The cross is constructed out of four inch diameter metal pipes that are painted white.

The cross was erected in 1934, 60 years before Congress created the Preserve, by the Veterans of Foreign Wars as a memorial to veterans who died in World War I. Photos show the presence of wooden signs near the cross stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." The wooden signs are no longer present, and the original cross, which is no longer standing, has been replaced several times by private parties since 1934.

There is currently no plaque at the cross indicating that it was intended to act as a memorial for soldiers.

The cross has been a gathering place for Easter Sunrise services since as early as 1935. Visitors to the Preserve also use the site to camp.

The NPS has not opened up the area of Sunrise Rock to individuals to erect other free-standing permanent displays, religious or otherwise, and there are no other free-standing displays, religious or otherwise, in the area.

The controversy surrounding the cross surfaced in 1999, when the NPS received a letter from an individual who identified himself as "Sherpa San Harold Horpa" of Jensen, Utah. The person who sent the letter under the alias "Sherpa San Harold Horpa" is also known to Buono as Herman R. Hoops ("Hoops"), a retired NPS employee and long-time acquaintance of Buono. Hoops requested permission from the NPS to erect a "stupa" (a dome-shaped Buddhist shrine) on a rock outcrop at a trail head located near the cross.

In a May 27, 1999, letter, the NPS informed Hoops that agency regulations codified at 36 C.F.R. § 2.62(a) would prohibit Hoops from installing a religious symbol, such as a stupa. The NPS noted that it intended to remove the cross located at that site.

On October 6, 1999, the American Civil Liberties Union ("ACLU") sent the NPS a letter expressing concern about the cross and threatened legal action if the NPS did not remove the cross.

After receiving the ACLU's October 6, 1999, letter, Martin directed the NPS staff to study the history of the cross. On January 31, 2000, the NPS completed an evaluation of the cross for commemorative significance, and

concluded that the cross did not qualify for inclusion in the National Register of Historic Places.

The NPS was informed during contacts with local citizens that immediately removing the cross could lead to significant public opposition. The NPS had encountered considerable public opposition to earlier decisions to remove privately-owned items interfering with its management of the Preserve.

On August 3, 2000, the ACLU wrote to NPS Director Robert Stanton and asserted that the cross on federal land violated the United States Constitution and that the ACLU would sue the NPS within 60 days unless the NPS removed the cross. The ACLU letter stated: "If we do go forward with a lawsuit, a court not only would order the government to remove the cross, but it also likely would assess damages against those responsible government officials who knew about the cross and yet did nothing about it [in] the face of the clear constitutional commands that make its presence on government property illegal."

Martin distributed a memorandum to her staff on October 6, 2000, informing it of her decision to remove the cross, citing her concern over the threatened private damage claim. After receiving the ACLU letters, the NPS located the private individuals believed to be responsible for maintaining the cross. Martin met with them and discussed the possibility of their voluntarily removing the cross. The individuals expressed their unwillingness to remove the cross and their determination to replace the cross if it were taken down.

On October 20, 2000, Reynolds wrote to inform the ACLU that the NPS intended to remove the cross.

San Bernardino County Supervisor Kathy A. Davis wrote to Congressman Jerry Lewis ("Lewis") (R-CA) on November 2, 2000, protesting the removal of the "veteran's memorial." In response to an inquiry from Lewis, Reynolds informed Lewis of the NPS's decision to remove the cross. NPS did not immediately remove the cross.

On December 15, 2000, the United States Congress passed an appropriations bill, the Consolidated Appropriations Act, a provision of which provided that none of the appropriated federal government's funds may be used to remove the cross. Then-President Clinton signed the law on December 21, 2000. The NPS did not act to remove the cross due to the legislative spending ban.

In December 2001 Congress passed PL 107-117, the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act, a provision of which designated the cross as a national memorial commemorating United States participation in World War I. The law provides funds to install a memorial plaque at the foot of the cross.

Buono worked for the NPS from 1972 to 1997. Buono was the Assistant Superintendent of the Preserve from September 1994 until December 1995. He held the same title at the Joshua Tree National Park until his retirement.

Buono became aware of the cross in 1995, when as the then-Assistant Superintendent of the Preserve, he was driving on Cima Road and "saw the cross on the small granite outcropping to which it is affixed."

Buono has never observed any sign, plaque, or indication of religious services performed at Sunrise Rock. He observed the cross perched on a rock off the highway from a distance of several hundred feet. He described the area surrounding the cross as a natural desert environment, with the only visible signs of human activity from Sunrise Rock being off-road vehicle tracks and a parking area for trail hikers, but with no buildings, telephone poles, or power lines in view.

He has no knowledge of anything the NPS has done to erect, maintain, or sponsor the cross, nor is he aware of any permit issued by the NPS or BLM regarding the cross.

Buono was actively involved in the designation of the Preserve as a national park area and its transfer from the control of the BLM to the NPS.

He regularly consulted with employees at the NPS legislative affairs office, wrote position papers, and sponsored a panel discussion in an effort to have the California Desert Protection legislation enacted into law.

Buono has remained actively involved in the Preserve since he moved from the area and since his retirement from the NPS.

Although he now lives in Oregon, Buono regularly visits the Preserve. Since leaving the NPS he has visited the Preserve two to four times a year on average.

Because of his continuing concern with the Preserve, Buono maintains regular contact with a wide variety of persons and groups located in or involved with the Preserve, including the National Audubon Society, National Parks Association, Southwest Center for Biological Di-

versity, Citizens for Mojave National Park, and the Public Employees for Environmental Responsibility.

Buono next intends to visit the Preserve in the Spring of 2002.

In 2002, Buono also intends to sell his home in Oregon, to relocate to Southern California or Arizona, and to make more frequent trips to the Preserve.

Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.

Buono will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve.

The NPS has no record of a complaint by Buono concerning the cross during his NPS career. Buono never mentioned or objected to the cross in discussions with any fellow employee of the NPS during his tenure as Assistant Superintendent of the Preserve. At no time did he ever discuss the legality of the cross with his agency's legal adviser. Buono submitted written comments to the Preserve on its draft General Management Plan in 1998, after he was aware of the cross, but he did not address or object to the cross. After he left the NPS, Buono spoke once about the cross with the Preserve's Chief Ranger, Sean McGuinness, in November 2000.

Schwartz is a many times decorated Jewish veteran of the United States Armed Forces.

He joined the Air National Guard in 1953 and was on active duty in the Air Force from 1956 until 1978.

Schwartz served in a variety of places, including March Air Force Base in California, as well as in Korea and in Vietnam from January 1967 through January 1968.

Schwartz is a member of a wide variety of veterans' organizations.

He is the Quartermaster of Post 152 of the Jewish War Veterans, Commander of Post 6476 of the Veterans of Foreign Wars ("VFW"), and Chaplain of American Legion Post 155.

Schwartz lives in Rialto in San Bernardino County, California, approximately three hours' drive from the cross.

Schwartz has lived for the past 23 years in San Bernardino County, the same county that encompasses the Preserve and the cross, and was unaware of its existence until September 2001, when a fellow veteran mentioned it at a VFW Post meeting and the chairman of the "action committee" asked him to "check out" the cross. He never had any occasion to visit the Preserve or view the cross until he decided to become a plaintiff in this action. He is not offended or injured by the sight of the cross, only by the fact that the land on which it rests is federally owned.

Schwartz first visited the cross in October 2001, while taking a side excursion en route to Las Vegas. He saw no sign directing him to the location of the cross,

and does not recall any markings indicating who owned the surrounding land, other than his vague recollection of a sign that he was entering the Preserve. He has no personal knowledge of whether and which portions of the land within the boundaries of the Preserve are owned by the United States, the State of California, or private citizens. Schwartz has no personal knowledge of whether or not the land on which the cross is situated is federal.

He first observed the cross from his car at a distance of approximately 50 feet while driving south on Cima Road from Interstate 15. After driving past the cross and turning around, he saw the cross driving back north from a "very short distance," estimated at 20 feet.

Schwartz observed that the rock on which the cross is located is 15 to 20 feet in height. Schwartz climbed to within 10 feet from the cross, which he described as made of four-inch white painted pipe, and approximately six feet in height. He enjoyed "extremely clear" visibility of at least a mile from atop the rock, but observed no other signs of human habitation or buildings, just the paved road, rock, weeds, and probably some cactus. Schwartz saw no evidence at the cross of any lights, plaques, signs, or religious worship (besides the cross itself). He also knows of no NPS activity in the area, including maintenance or sponsorship of the cross.

Schwartz is offended by the presence of the cross on federal land because he does not believe that the United States should permit sectarian religious symbols on government property unless the property is open to all to erect other symbols or displays.

His further reaction to the cross itself is that it is "very nice to have put it up there whoever did it," and

the sole basis for his objection is its presence on federal land.

At the time Schwartz climbed up near the cross, there were no plaques or other signs stating that the cross is intended to be a veterans' memorial.

Even if such signs were there, the cross would offend Schwartz, because a sectarian Christian symbol is not meaningful to him as a Jewish war veteran.

The presence of the cross negatively affects Schwartz' enjoyment of the area as he passes through it.

Schwartz intends to visit the cross area regularly during his trips to Las Vegas because he finds the presence of the cross on government land offensive. He will go to see if it has been taken down.

Schwartz never contacted the NPS to express any concern or objection regarding the cross.

Norton is the Secretary of the DOI. As Secretary of the DOI, she oversees the NPS.

Reynolds is the Regional Director of the Pacific West Region of the NPS. The Preserve is within the Pacific West Region of the NPS.

Martin is the Superintendent of the Preserve.

IV.

ANALYSIS

A. Legal Standard Governing Motion For Summary Judgment

Under Rule 56(c), a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, to-

gether with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c).

The Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (quoting Rule 56(e) and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *See T.W. Elec. Serv.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*,

477 U.S. at 322, 106 S.Ct. at 2552. The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986); *see also Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355-56 ("[W]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."). This court thus applies to either party's motion for summary judgment the same standard as that for a motion for a directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *T.W. Elec. Serv.*, 809 F.2d at 630.

B. Plaintiffs' and the Government's Motions

The court concludes that the evidence as presented by both Plaintiffs and the government does not establish any triable issues of material fact. Consequently the court will consider and decide under the uncontroverted material facts (1) whether Buono and Schwartz have standing to assert their constitutional claims, and (2) if either or both of them has standing as a matter of law, whether the presence of the cross on federally owned land in the Preserve violates the Establishment Clause of the First Amendment to the United States Constitution.

1. *Standing*

Article III of the United States Constitution limits federal court jurisdiction to "Cases" and "Contro-

versies." U.S. Const. art. III, § 2; *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2135-36, 119 L. Ed. 2d 351 (1992). Standing, or "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612-13, 109 S. Ct. 2037, 2043, 104 L. Ed. 2d 696 (1989) (citing *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)), is therefore a matter of constitutional dimension.

Plaintiff must satisfy three requirements in order to establish Article III standing. First, plaintiff "must demonstrate 'injury in fact'—a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771, 120 S. Ct. 1858, 1861, 146 L. Ed. 2d 836 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 1723, 109 L. Ed. 2d 135 (1990) (internal quotation marks and citation omitted)). Second, she "must establish causation—a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976)). Third, she "must demonstrate redressability—a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* at 771, 120 S. Ct. at 1861-62 (quoting *Simon*, 426 U.S. at 45, 96 S. Ct. at 1928).

The government does not contest that Buono and Schwartz satisfy the redressability prong because part of the relief, namely, ordering the government to remove the cross, would remedy the alleged injury in fact.

Therefore, the court will address the government's contentions that Buono and Schwartz have not demonstrated injury in fact and causation.

a. Injury in fact

To allege an injury in fact, plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. In the Establishment Clause context, injury in fact exists if plaintiff was "subjected to unwelcome religious exercises or [was] forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n. 22, 102 S. Ct. 752, 766 n. 22, 70 L. Ed. 2d 700 (1982). *See also, e.g., Arizona Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927, 929 (D.Ariz.2000) (quoting *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (quoting in turn *Valley Forge*, 454 U.S. at 487 n. 22, 102 S. Ct. at 766 n. 22)).

With respect to being "subjected to unwelcome religious exercises," "religious exercises" can include "religious displays":

> Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence. The injury that gives standing to plaintiffs in these cases is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state. Applying *Valley Forge*, many lower courts have thus premised standing on the injury that results from unwelcome personal contact with a state-sponsored religious display.

Suhre v. Haywood County, 131 F.3d 1083, 1086-87 (4th Cir.1997) (citing *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987); *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga.), *aff'd*, 15 F.3d 1097 (11th Cir. 1994)). There is no question based on the uncontroverted facts that both Buono and Schwartz were harmed by being subjected to an unwelcome religious display, namely the cross. Each Plaintiff came into a direct and unwelcome contact with the cross. Each was offended by its presence, and each will continue to be offended by its presence on subsequent, imminent trips by them to or near the site of the cross.

With regard to the second disjunctive element for standing in Establishment Clause cases—being forced to assume burdens to avoid government-endorsed religion—the government contends that Plaintiffs' exposure to the cross should be disregarded for purposes of standing because Plaintiffs could have avoided the harm. However, the Seventh Circuit has expressly rejected such an argument, and the court adopts its reasoning. In *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (Posner, J.), the Seventh Circuit responded to defendant's contention that "plaintiffs have inflicted this cost on themselves and can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the . . . cross." 794 F.2d at 268. The court held "[t]hat the injury to the plaintiffs could have been averted . . . did not deprive the plaintiffs of standing," commenting that

"[i]f [they] lacked standing . . . no one would have standing." *Id.* at 268-69. By the government's logic, all individuals offended by a religious display could avoid it and thereby not be harmed by it. Such an argument flies in the face of standing jurisprudence and would render the Establishment Clause a nullity.

In the same vein, the government claims that Buono's and Schwartz's standing is as tenuous as that of plaintiffs in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), because plaintiffs' standing here, as in *Bear Lodge*, is based on plaintiffs' "coming to the injury." The *Bear Lodge* plaintiffs challenged, inter alia, the constitutionality of the government's request that plaintiffs refrain from rock climbing in a certain area. *See id.* at 820-22. Finding that plaintiffs did not have standing, the court focused on the fact that plaintiffs' compliance with the request was voluntary. *See id.* at 821-22. However, Plaintiffs' standing here is not premised on conduct pursuant to the same precatory request as that of the *Bear Lodge* plaintiffs. The cross will remain on the federal land, continuing to harm Buono and Schwartz when they are in or near the area, unless and until the court orders it removed.

The fact that Schwartz initially proactively sought to find the cross is also irrelevant. Standing sufficient to warrant the imposition of prospective injunctive relief is not based on Schwartz's previous visits to the Preserve, but rather on such future visits. While the fact that he intends to visit the cross regularly "*because* he finds the presence of the cross . . . offensive" might not establish an injury in fact, *see Valley Forge*, 454 U.S. at 487, 102 S.Ct. at 766 (commenting that plaintiff may not "roam the country in search of governmental wrongdo-

ing" in order to gain standing), Schwartz also asserts that his "enjoyment of the area" will be lessened due to the presence of the cross when he passes through the Preserve in the future for reasons other than checking on the status of the cross. Such harm constitutes injury in fact.[4] In other words, the court concludes that both Plaintiffs have incurred an actual and particularized concrete injury, not a generalized grievance, by the existence of the cross as located in the Preserve.

In sum, the Ninth Circuit has held repeatedly that plaintiffs who are prevented from freely using public land due to a religious symbol being located thereon have suffered an injury in fact. *See, e.g., Separation of Church and State Comm. v. City of Eugene,* 93 F.3d 617, 619 n. 2 (9th Cir. 1996) (per curiam) ("SCSC"); *Ellis v. City of La Mesa,* 990 F.2d 1518, 1523 (9th Cir. 1993); *Hewitt v. Joyner,* 940 F.2d 1561, 1564 (9th Cir. 1991). Here, as a result of the presence of the cross, Buono, who regularly visits the Preserve, will avoid traveling on Cima Road, which is often the most convenient means of access to the Preserve. Schwartz, who also plans on passing through the Preserve, is unable to enjoy the area fully due to the presence of the cross. The presence of

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[4] The uncontroverted material facts are silent with respect to whether Schwartz will see the cross when he "passes through" the area in the future. However, neither Buono nor Schwartz actually needs to see the cross in order to be injured by its presence. *Compare Books v. City of Elkhart,* 235 F.3d 292, 297 (7th Cir.2000) (finding that plaintiffs have standing, even though their injury was based, at least in part, on the fact that they "know the [religious symbol] is there whether [they] see it or not"). It is sufficient for purposes of standing that Plaintiffs know that the cross will remain until the government removes it, which knowledge will negatively affect their enjoyment of the area as they pass through the Preserve.

the cross clearly prevents them from freely using public land.

In the case most analogous to the situation at bar, *SCSC*, the Ninth Circuit made short thrift of defendant City of Eugene's standing arguments. Ruling on the constitutionality of a latin cross situated in a public park, the Ninth Circuit disposed of a challenge to plaintiff's standing in a footnote: "As a threshold matter, we note that [plaintiff organization] is composed of local citizens who have standing to bring this challenge because they alleged that the cross prevented them from freely using the area." *SCSC*, 93 F.2d at 619 n. 2.[5] Here, Buono will not travel on Cima Road and Schwartz cannot enjoy his travels through the Preserve due to the presence of the cross. This is sufficient to constitute injury in fact. *Compare City of St. Charles*, 794 F.2d at 268 (holding that plaintiffs have standing to assert Establishment Clause violation because, in part, a cross "led [plaintiffs] to alter their behavior").[6]

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[5] The government seeks to distinguish the *SCSC* court's discussion of standing because the cross in *SCSC* was larger and otherwise more prominent than the cross here. Even if this were the case, the court is nonplussed how the size and prominence of a cross in any way affects whether plaintiffs, who had direct contact with the cross, and who were and will continue to be injured by its presence, have standing. *Compare Rabun*, 698 F.2d at 1108 (commenting that "the Supreme Court has made it clear that no minimum quantitative limit is required to establish injury [in fact]").

[6] The government raises three issues with respect to Plaintiffs' injury in fact, or lack thereof, that have yet to be addressed by the court, none of which warrants more than brief mention. First, in an argument that the government quixotically both advances and concedes as baseless, the government claims that Plaintiffs have not suffered an injury in fact because their contact with the cross is for a very short period of time. However, any viewing of an allegedly unconstitutional religious

b. Causation

The government contends that the uncontroverted facts do not establish as a matter of law a fairly traceable connection between the injury in fact to Plaintiffs and the alleged conduct of the government. It argues that private individuals erected and maintained the cross, and that the government has taken no affirmative action to support the religious symbol. However, as Plaintiffs point out, the government has taken and will continue to take affirmative action in support of the cross, and, in any event, governmental affirmative action is not necessary to establish causation for the purpose of standing in Establishment Clause cases.

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symbol, no matter how brief, is significant, and the government cites no judicial authority to the contrary. Second, the government argues that the presence of the cross does not impede Plaintiffs' enjoyment of "nearly all" of the 1.6 million acres of the Preserve. This is a similarly unavailing argument. *See, e.g., Gonzales*, 4 F.3d at 1417 (one cross on 336 acres of public park did not negate plaintiffs' standing because "denial of even a portion of the Park is an injury in fact"). *See also Valley Forge*, 454 U.S. at 486 n. 22, 102 S.Ct. at 766 n. 22 (plaintiff has standing in Establishment Clause action when she alleges that she must assume burdens to avoid a religious symbol).

Third, the government makes much of the fact that neither Buono nor Schwartz complained about the presence of the cross prior to their filing the present action. Judicial precedent does not support Defendants' implied contention that the lack of pre-trial complaints about the alleged unconstitutionality of a religious symbol should factor into standing analysis. Courts in similar situations have held that plaintiffs have standing without questioning their lack of pre-trial complaints. *See, e.g., Books*, 235 F.3d at 296-97 (plaintiffs who had lived in close proximity to allegedly unconstitutional religious symbol for decades had standing, notwithstanding that there was no evidence that they had complained about the presence of the symbol prior to their filing the complaint).

First, the government has and will continue to support maintaining the cross. Citing an administrative regulation, the NPS refused Hoops' request to erect another religious display in the same area of the Preserve as the cross. In its letter denying the request, the NPS advised Hoops that it intended to remove the cross.[7] However, recent federal legislation banning the NPS from spending money to remove the cross precludes it from doing so. Moreover, the NPS, pursuant to federal law, plans to install a memorial plaque at the base of the cross. The first governmental action—refusing the installation of another religious symbol, while permitting the presence of the cross—constitutes governmental support for the cross; the second—spending money and installing a plaque at the site of the cross, while prohibiting the NPS from using appropriated money to remove the cross—constitutes both governmental support for and maintenance of the cross. These affirmative actions provide a "fairly traceable connection" between the injury in fact and the government's conduct. *See Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir.1996).

Second, a showing of affirmative action by the government is not required to establish the causation element of standing in order to challenge the constitutionality of a religious display on government land when the government has not opened up the area to other religious displays. Numerous courts have held that plain-

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[7] The government appears to argue that one reason it did not remove the cross was Martin's apprehension that doing so would have subjected her to physical abuse from local citizens. While the court is sympathetic to Martin's concern for her well-being, the court finds it irrelevant to the issue of Plaintiffs' standing.

tiffs have standing to challenge the constitutionality of religious symbols neither erected nor maintained by the government. *See, e.g., Books*, 235 F.3d at 295-301 (holding that plaintiffs have standing to challenge the constitutionality of monument inscribed with the Ten Commandments placed on government land by private organization, even though government did not maintain the structure); *Gonzales v. N. Township*, 4 F.3d 1412, 1414-17 (7th Cir. 1993) (holding that plaintiffs have standing to challenge the constitutionality of the presence of a cross in a city park, even though the cross was neither erected nor financially maintained by the government). While the court concludes from the uncontroverted facts that the federal government did and will take affirmative action in support of maintaining the cross, establishing a certain traceable connection between the injury in fact and the government's conduct, the mere presence of the cross on federal land is sufficient to satisfy the causation prong.

While, in general, "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases," *Murray*, 947 F.2d at 151, this is not such a case. The court concludes as a matter of law that both Buono and Schwartz have standing to challenge the constitutionality of the government's maintaining the presence of the cross under the Establishment Clause. The court now will consider the constitutionality of the presence of the cross in the Preserve.

2. *Constitutionality of the Presence of the Latin Cross*

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of reli-

gion . . . . " U.S. Const. amend. 1. According to the Supreme Court, "the Establishment Clause [has come] to mean that government may not promote or affiliate itself with any religious doctrine or organization . . . ." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 590-91, 109 S.Ct. 3086, 3099-3100, 106 L. Ed. 2d 472 (1989).

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, *e.g., Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S. Ct. 1673, 1683, 72 L. Ed. 2d 33 (1982).

Id. at 605, 109 S.Ct. at 3107.

The parties agree that the Supreme Court's ruling in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), sets forth the governing test to evaluate an alleged Establishment Clause violation. *See also Alvarado v. City of San Jose,* 94 F.3d 1223, 1231 (9th Cir. 1996) (noting that "the *Lemon* test is the one applied in this circuit") (citing *Brown v. Woodland Joint Unified Sch. Dist.,* 27 F.3d 1373, 1378 (9th Cir. 1994); *Kreisner v. San Diego,* 1 F.3d 775, 780 (9th Cir. 1993)). A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither ad-

vances nor inhibits religion, and (3) does not foster excessive state entanglement with religion. *See Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111. "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L. Ed. 2d 510 (1987); *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1397 (9th Cir. 1994) (citing *Edwards*).

The government maintains that its actions satisfy all of *Lemon*'s test elements, while Plaintiffs contend that the government has run afoul of both the purpose and effect prongs. The court need not assess whether the purpose prong is violated because the primary effect of the presence of the cross advances religion.

The effect prong "asks whether, irrespective of government's actual purpose, the practice . . . in fact conveys a message of endorsement or disapproval [of religion]." *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S. Ct. 1355, 1368, 79 L. Ed. 2d 604 (O'Connor, J., concurring). With regard to whether the presence of the cross has a primary effect that advances or inhibits religion, or conveys a message of governmental endorsement or disapproval of religion, the court is bound by *SCSC*, which, in applying the effect prong, concluded that the presence of a particular cross on government land violated the Establishment Clause. The *SCSC* court, faced with facts materially indistinguishable from those in the action at bar, assessed the constitutionality of a latin cross that was erected by private individuals. *See id.* at 618. These individuals deeded the cross to the City of Eugene, which placed a plaque "at the foot of the cross dedicat[ing] it as a memorial to war veterans." *Id.* Every year, the City of Eugene illuminated the cross for seven

days during the Christmas season, five days during the Thanksgiving season, and one day each on Memorial Day, Independence Day, and Veteran's Day. *See id.*

The Ninth Circuit concluded that it was "simple" and "straightforward" that the presence of the cross had a primary effect that advanced religion, and thus was unconstitutional. *Id.* at 620 n. 5. Finding that "[t]here is no question that the Latin cross is a symbol of Christianity," and that "the cross may reasonably be perceived as governmental endorsement of Christianity," the court held that "its placement on public land by the City of Eugene violates the Establishment Clause." *Id.* at 620 (concluding that "the City of Eugene has impermissibly breached the First Amendment's 'wall of separation' between church and state"). This is notwithstanding the fact that the cross served officially as a war memorial. *See id.* at 618-19.[8]

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[8] Many other courts have similarly held that a religious symbol's official designation as a war memorial does not shield it from constitutional scrutiny. *See, e.g., Gonzales*, 4 F.3d at 1421 ("*Lemon* does not permit a municipality to exempt a[sic] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to our honored dead."); *Jewish War Veterans of U.S. v. United States*, 695 F. Supp. 3, 14 (D.D.C. 1988) ("The use of a cross as a memorial to fallen or missing servicemen is a use of what to some is a religious symbol where a nonreligious one likely would have done as well. The Court is constrained to find that cross cannot satisfy the secular effect prong of the *Lemon* test because it conveys a message of endorsement of Christianity."); *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 235 (S.D. Tex.1984) ("[E]ven if one strains to view the symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county.").

Defendants attempt to distinguish *SCSC* on two bases: First, that the cross in *SCSC* was much more noticeable than the cross at bar. Second, that the government is significantly less intertwined with the cross here than in *SCSC*. *Compare Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337, 107 S. Ct. 2862, 2869, 97 L. Ed. 2d 273 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.") (emphasis in original). However, neither distinction is apt.

While it is true that the *SCSC* cross, unlike the cross at bar, was large (51 feet tall), illuminated at night, and located in a relatively populous city, these characteristics are largely inapposite factors to Establishment Clause analysis. While the "particular physical setting" is a relevant consideration in assessing whether the presence of a religious symbol violates the Establishment Clause, *see, e.g., Allegheny*, 492 U.S. at 597, 109 S. Ct. at 3103, nothing in *SCSC* suggests that the particular setting of the cross in question militates in favor of finding its presence meets the primary effect standard. Quite the opposite: the cross is on federal land, and the court concludes from the uncontroverted material facts that a reasonable observer would believe that such land and the cross are owned by the government. *See Allegheny*, 492 U.S. at 620, 109 S. Ct. at 3115 (whether primary effect advances or inhibits religion is to be assessed according to the standard of a "reasonable observer"). *Compare SCSC*, 93 F.3d at 626 (O'Scannlain, J., concurring) (rejecting defendant's argument that the cross is constitutional because it "stands so remote from any government buildings").

Furthermore, the court concludes that the size of a cross and the number of people who view it are not important for deciding whether a reasonable observer would perceive the cross located on federal land as governmental endorsement or disapproval of religion. *Compare Books*, 235 F.3d at 296 (religious symbol that is six feet tall and three-and-a-half feet wide was unconstitutional); *American Civil Liberties Union of Ohio v. City of Stow*, 29 F. Supp. 2d 845, 847 (N.D. Ohio 1998) (holding unconstitutional a city seal, which was displayed on, inter alia, official City stationary and letterhead, because the upper-left quadrant depicted an open book, overlaid with a cross). Similarly, the constitutionality of the presence of a religious symbol does not depend on the number of people who view the symbol. It is sufficient that Plaintiffs have been and will continue to be harmed by the presence of the cross. *Compare SCSC*, 93 F.3d at 625-26 n. 11 (O'Scannlain, J., concurring):

> I do not subscribe to the notion that a constitutional violation results merely because the cross . . . is visible to many. Whether a religious display garners a great deal of attention or is scarcely noticed is irrelevant to the Establishment Clause. Rather, the Establishment Clause focuses on whether the religious display creates an appearance of governmental endorsement of religion. Thus, how few or how many people view the display does not advance the analysis.

With respect to the government's attempt to distinguish *SCSC* on the ground that the government in *SCSC* was more intertwined with the cross than is the government as to the subject cross, this contention lacks merit. It is true that in *SCSC*, unlike in the present situation,

the City of Eugene granted a permit (post-erection) to the individuals who erected the cross, and then accepted a deed to the cross. *See* 93 F.3d at 618. In addition, the City of Eugene illuminated the cross fifteen days annually. *See id.* However, as discussed above, the uncontroverted facts are that the government is intimately connected to the cross. *See supra* Section B.1.b.[9]

Here, as in *SCSC*, the presence of the cross on federal land conveys a message of endorsement of religion. Thus, the court concludes as a matter of law based on the uncontroverted facts that the presence of the cross on the federal land portion of the Preserve is unconstitutional, and the court will grant Plaintiffs' Motion for summary judgment and deny the government's Motion for summary judgment.[10]

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[9] In so finding, the court notes that it is not engaging in an analysis pursuant to the third *Lemon* prong-excessive state entanglement with religion. Rather, it is merely responding to the government's attempts to distinguish *SCSC*.

[10] To the extent that the government contends that the court should not rule on the constitutionality of the presence of the cross due to the plenary power doctrine, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . . "), its argument is unsupportable. In essence, the government asks this court to hold that the plenary power doctrine as embodied in the Property Clause trumps all constitutional provisions. This position is both contrary to law and bad policy. First, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction *so long as the exercise of that authority does not offend some other constitutional restriction.*" *Buckley v. Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 688, 46 L. Ed. 2d 659 (1976) (per curiam) (internal citation omitted) (emphasis added). Moreover, under the government's argument, Congress could pass and the President could sign legislation that allows discrimination on the basis of race or gender, or that permit the restriction of speech, so long as such conduct occurs on

V.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

1) Plaintiffs' Motion for summary judgment is GRANTED; and

2) the government's Motion for summary judgment is DENIED.

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federal land. However, the legislative and executive branches' exercise of their constitutional powers continues to be subject to compliance with the Establishment Clause of the First Amendment, one of the oldest Amendments to the United States Constitution.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DISTRICT

ED CV 01-216-RT

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JOHN J REYNOLDS, REGIONAL DIRECTOR, PACIFIC NORTHWEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

[July 24, 2002]

JUDGMENT

On July 24, 2002, the Court made an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Order"). Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be entered in Plaintiffs' favor on their claim for declaratory and injunctive relief.

IT IS FURTHER ORDERED ADJUDGED AND DECLARED that the actions of Defendants, as stated in the uncontroverted material facts section of the Order, violated Plaintiffs' rights under the Establishment Clause of the First Amendment to the United States Constitution.

IT IS FURTER ORDERED AND ADJUDGED that Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.

IT IS FURTER ORDERED AND ADJUDGED that Plaintiffs recover their costs against Defendants in the amount of $_____.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs have sixty days from the entry of this Judgment to file any motion for attorney's fees.

DATED: July 24, 2002.

/s/ ROBERT J. TIMLIN
ROBERT J. TIMLIN
United States District Judge

APPENDIX G

1. Section 8121 of the Department of Defense Appropriations Act of 2004, Pub. L. No. 108—87, 117 Stat. 1054, 1100, provides:

(a) EXCHANGE REQUIRED.—In exchange for the private property described in subsection (b), the Secretary of the Interior shall convey to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107-117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war. Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569-051-44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

(c) EQUAL VALUE EXCHANGE; APPRAISAL.—The values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d).

The value of the properties shall be determined through an appraisal performed by a qualified appraiser in conformance with the Uniform Appraisal Standards for Federal Land Acquisitions (Department of Justice, December 2000).

(d) CASH EQUALIZATION.—Any difference in the value of the properties to be exchanged under this section shall be equalized through the making of a cash equalization payment. The Secretary shall deposit any cash equalization payment received by the Secretary under this subsection in the Land and Water Conservation Fund.

(e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

(f) BOUNDARY ADJUSTMENT; ADMINISTRATION OF ACQUIRED LAND.—The boundaries of the Mojave National Preserve shall be adjusted to reflect the land exchange required by this section. The property acquired by the Secretary under this section shall become part of the Mojave National Preserve and be administered in accordance with the laws, rules, and regulations generally applicable to the Mojave National Preserve.

2. Section 8137 of the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act of 2002, Pub. L. No. 107—117, 115 Stat. 2230, 2278, provides:

(a) DESIGNATION OF NATIONAL MEMORIAL.—The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

(b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.

(c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

OPPOSITION BRIEF

No. 08-472

IN THE

Supreme Court of the United States

DIRK KEMPTHORNE, Secretary of Interior, *et al.*,

Petitioners,

—v.—

FRANK BUONO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a person who regularly visits government land on which a sectarian religious symbol sits, and who incurs burdens to avoid coming into direct and unwelcome contact with that symbol, has Article III standing to bring an Establishment Clause suit challenging the governmental display of the symbol?

Whether, after a court has held that the presence of a sectarian religious symbol on government land violates the Establishment Clause, the transfer of that land perpetuates the Establishment Clause violation when the symbol remains designated by the government as an official memorial, the government retains a reversionary interest in the land, and the land transfer benefits persons whose religious expression with respect to the symbol previously has been favored by the government to the exclusion of others who wished to engage in expression on the land?

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Pub. L. No. 107-248, 116 Stat. 1519, 1551, § 8065(b) (2002) 3

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Other Authorities

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COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Presence Of A Sectarian Religious Symbol On Federal Land

A Latin cross sits on federal land in the Mojave National Preserve (the "Preserve") in California. Pet. 54a. A Latin cross has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter. Pet. 55a. The Latin cross is the preeminent symbol of Christianity. *Id.* It is exclusively a Christian symbol, not a symbol of any other religion. *Id.*

The Mojave cross is between five and eight feet tall and is made of four-inch diameter pipes painted white. Pet. 55a. The cross is located in an area known as Sunrise Rock. Pet. 117a. It is mounted on the top of a prominent rock outcropping on the north side of Cima Road and it is visible to vehicles on the road from about 100 yards away. Pet. 118a.

A cross was first erected on the site in 1934 by the Veterans of Foreign Wars ("VFW"), Death Valley Post 2884, to honor those who died in combat. Pet. 118a. Religious adherents have held Easter Sunrise services at the cross for more than 70 years. Pet. 119a. Private parties have replaced the cross several times over the years. *Id.* A private party, who did not obtain a permit from the government, erected the current version of the cross in approximately 1998. Pet. 56a. There is no plaque or sign at or near the cross indicating that it is meant to be a memorial for soldiers. Pet. 118a. In 1999, the National Park

Service ("NPS"), a division of the U.S. Department of the Interior, evaluated the cross for eligibility for the National Register of Historic Places and concluded it did not qualify. Pet. 117a, 119a-20a.

The NPS administers the federal Preserve upon which the cross sits. Pet. 117a. The Preserve encompasses 1.6 million acres of land in the Mojave Desert, over 90 percent of which is federally owned. Pet. 55a. The federal Bureau of Land Management (BLM) transferred the land to NPS in 1994. *Id.*

The NPS has not allowed other individuals to erect free-standing permanent displays (religious or otherwise) in the Sunrise Rock area where the cross is located, and there are no other free-standing displays in the area. Pet. 119a. In 1999, the NPS denied permission to an individual who sought to erect a Buddhist memorial (known as a "stupa") in the area near the cross, citing to 36 Code of Federal Regulations 2.62(a) which provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." Pet. 56a-57a. The NPS denial letter further informed the applicant that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and or arrest." Pet. 57a.

B. The Government's Efforts to Preserve the Cross

In the late summer of 2000, the American Civil Liberties Union of Southern California wrote to the NPS Director expressing constitutional concern about the presence of the cross in the Preserve. Pet. 120a. Shortly thereafter, on December 15, 2000, the

President signed an appropriations bill, a section of which provided that no government funds could be used to remove the cross. Pub. L. No. 106-554, 114 Stat. 2763, 2763A-230, § 113 (2000); BIO App. 1a.

Respondent brought this action on March 22, 2001. On January 10, 2002, while the matter was pending in the district court, Congress passed Pub. L. No. 107-117, a section of which designated the cross as a national memorial commemorating United States participation in World War I. *See* Pub. L. No. 107-117, 115 Stat. 2230, 2278-79, § 8137 (2001); BIO App. 1a-2a. The law provides federal funds to install a memorial plaque at the site of the cross and for the construction of a replica of the cross that was originally on the site. *Id.* at § 8137(c).

On October 23, 2002, after the district court's initial decision holding that the presence of the cross in the Preserve violated the Establishment Clause, Congress again banned the use of federal funds to remove the cross. Pub. L. No. 107-248, 116 Stat. 1519, 1551, § 8065(b) (2002); BIO App. 2a. On September 30, 2003, during the pendency of Petitioners' first appeal to the Ninth Circuit, Congress enacted Section 8121 of Public Law 108-87.[1] This provision calls for the transfer of the property on which the cross sits to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Preserve that is owned by Mr. and Mrs. Henry Sandoz, private parties who had erected the current cross in 1998. Pet. 9a. The land transfer authorized

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[1] The full text of Section 8121 is in Appendix G of the Petition. Pet. 147a-149a

by Section 8121 is not based on open bidding or any other competitive process; instead, Congress simply directed that the land be transferred to the VFW's Barstow post. Although Section 8121(a) transfers the cross's land to private parties, it nonetheless also states that "the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137 [of Public Law 107-17]." Pet. 61a, which (as indicated above) designated the cross a national memorial. Another provision, Section 8121(e), states that if the "property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." Pet. 61a.

II. PROCEDURAL HISTORY

A. The District Court's First Decision

Respondent filed his lawsuit prior to the enactment of Sections 8137, 8065(b), and 8121. In his complaint, Respondent alleged that the presence of the cross on federal land and the government's preferential treatment of it violated the Establishment Clause. The district court held that Respondent had standing. Pet. 137a. The court then held that the presence of the cross in the Preserve violated the Establishment Clause, Pet. 137a-143a, and entered judgment for Respondent. Pet. 145a-146a. The court's injunction provided, in pertinent part, that "Defendants . . . are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." Pet. 146a.

B. The Court Of Appeals' First Decision

In a unanimous opinion by Judge Kozinski, the court of appeals affirmed the district court. The court of appeals held that Respondent had standing, Pet. 104a-107a, and that the presence of the cross in the Preserve violated the Establishment Clause because it created an appearance of government endorsement of religion. Pet. 108a-113a.

The government argued that Section 8121, which was enacted during the pendency of the appeal, mooted the case. After noting the government's concession that the "land transfer could take as long as two years to complete," Pet. 103a, the court of appeals rejected the government's argument. *Id.* at 102a-104a.

The government sought neither en banc review of the court of appeals' decision nor review of that decision in this Court.

C. The District Court's Second Decision

On November 29, 2004, Respondent filed a motion with the district court to enforce the injunction, or, in the alternative, to modify the injunction by expressly prohibiting the Section 8121 land transfer. On April 8, 2005, the district court held that Section 8121's land transfer perpetuated, rather than remedied, the Establishment Clause violation. Pet. 86a-99a. In reaching that conclusion, the district court "applied the analytical framework" from *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir.

2005) Pet. 90a-91a. Under that framework it considered the following factors: the congressional designation of the cross as a memorial; the method for effectuating the transfer; the preservation of governmental property interests in the form of a reversionary interest and easement; and the government's "herculean efforts" to preserve the cross, including Congress's barring the use of federal monies to take down the cross after the court's initial injunction. Pet. 91a, 93a, 97a. Based on those factors, the court held that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants." Pet. 97a. The district court barred Petitioners from implementing Section 8121 and ordered them to comply with the court's existing judgment and injunction. Pet. 99a.

D. The Court Of Appeals' Second Decision

The court of appeals again affirmed the district court. Adopting the reasoning of the Seventh Circuit in *Marshfield*, the court of appeals held that in evaluating whether a transfer of land to a private party has ended an Establishment Clause violation, the court "examine[s] both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. 76a (citing *Marshfield*, 203 F.3d at 491). Analyzing the form and substance of Section 8121, the court of appeals concluded that the land transfer did not cure the violation. In reaching that conclusion, the court of appeals largely relied on the

same factors that the district court had identified: the continued designation of the cross as a national memorial, and the government's resulting ongoing statutory responsibility for "the supervision, management, and control" of the cross; the government's future property interest in the land in the form of a reversionary interest; the actual method of the exchange; and the history of government efforts to preserve the cross. Pet. 77a-84a.

Subsequently, the court of appeals issued an order amending its opinion and (over a dissent) denying the government's petition for rehearing and suggestion for rehearing en banc on May 14, 2008. Pet. 35a-37a.[2]

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[2] Petitioners overstate the amendment to the Ninth Circuit's decision, which changed only a footnote characterizing *Marshfield*. Pet. 22. It did not amend any of the court's analysis of the case before it, nor did it amend its reliance on key passages from *Marshfield*. *Compare* Pet. 25a at n.13, *with* Pet. 36a-37a. In the amendment, the court of appeals simply deleted its characterization of *Marshfield* as creating a "presumption," recognizing that whatever *Marshfield* had said about a sale with no "unusual circumstances," the Seventh Circuit had in fact examined all the circumstances of each sale that came before it, "on a transaction-by-transaction basis," and that this approach was in accord with "[t]he Supreme Court's Establishment Clause jurisprudence [which] recognizes the need to conduct a fact-specific inquiry in this area." Pet. 36a-37a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' RECOGNITION THAT RESPONDENT HAS STANDING DOES NOT WARRANT REVIEW.

A. Respondent Has Article III Standing

A person subjected to unwelcome exposure to religious exercises or symbols, or who incurs burdens to avoid them, has suffered a cognizable Establishment Clause injury conferring Article III standing. *See, e.g., School Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("[S]chool children and their parents, who are directly affected by the laws and practices [mandating Bible readings in public school] against which their complaints are directed" have standing.); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982) ("The Plaintiffs in *Schempp* had standing . . . because impressionable schoolchildren were subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them.") (emphasis added); *see also id.* (contrasting *Schempp* with *Doremus v. Board of Education*, 342 U.S. 429 (1952), where plaintiffs lacked standing to challenge daily Bible readings in public school because they had no direct connection to those exercises, and thus had no need to assume special burdens to avoid the exercises).

Respondent satisfies this test. He has had direct and unwelcome contact with the cross in the Preserve and will incur burdens to avoid exposure to

it in the future. Pet. 123a. As the district court found, Respondent "will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." *Id.*[3]

Petitioners contend that Respondent's objection to the cross is merely "ideological," not "religious," and that such an objection does not qualify as injury for Article III standing purposes under *Valley Forge*. Pet. 12-14. Petitioners are wrong. *Valley Forge* clarified the rules of taxpayer standing in Establishment Clause cases but did not disturb this Court's longstanding rule, set forth in *Schempp*, 374 U.S. at 224 n.9, that direct and

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[3] Petitioners contend that Respondent lacks standing because the government is not forcing him to avoid coming into contact with the cross. Pet. 15. Their argument is foreclosed by this Court's precedents. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167 (2000), this Court held that a plaintiff who would have liked to swim, camp, and picnic upstream of a river into which defendant was discharging pollutants, but had altered his behavior because of the discharges, had standing to challenge defendant's practices. *Id.* at 182-84. Nothing in the Court's opinion suggests that the defendant forced the plaintiff to forego swimming in, or otherwise avoid the river. Similarly, in *Valley Forge*, the Court stated that steps taken by plaintiffs to avoid religious exercises constituted cognizable injury for standing purposes. *Valley Forge*, 454 U.S. at 486 n.22, even though participation exercises was "voluntary." *Schempp*, 374 U.S. at 207; *see also American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (Posner, J.) (rejecting government argument that plaintiffs lack standing to challenge religious display on public property because they "can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the lighted cross").

unwelcome contact with a government-sponsored religious display or practice is enough to confer Establishment Clause standing. *Valley Forge*, 454 U.S. at 486 n.22 (citing *Schempp*). Other cases since *Schempp* have rested on the same understanding. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 584 (1992) (holding that student who objects to graduation prayer at school she attends has standing to bring Establishment Clause claim).

The plaintiffs in *Valley Forge* had heard from a press release about the transfer of government property to a religious school; they lived in Maryland and Virginia and had never been to the area in Pennsylvania where the property was located. *Valley Forge*, 454 U.S. at 486-87. This Court held that the plaintiffs lacked standing to challenge the transfer because the mere fact that they were aware of, and distressed by, government activity with which they had no direct contact did not constitute a concrete and personalized injury. *Id.* at 485-86.

Contrary to Petitioners' thesis, this Court did not root its standing ruling in *Valley Forge* on the notion that the plaintiffs' objection to the transfer was ideological rather than religious. Indeed, the word "ideological" does not appear in the Court's opinion. As Judge Kozinski correctly observed in the initial court of appeals decision in this case, "*Valley Forge* nowhere suggests that plaintiffs lacked standing because their offense at the property transfer was grounded in ideological, rather than religious, beliefs. Rather, plaintiffs lacked standing because their sense of offense was unaccompanied by 'any personal injury suffered . . . as a consequence of the alleged constitutional error.'" Pet. 106a (quoting

Valley Forge, 454 U.S. at 485). As Judge Kozinski recognized, *Valley Forge* drew a distinction between abstract, generalized objections, which are insufficient for Article III standing, and concrete objections that may result from direct contact with the challenged display or practice, which are sufficient for Article III standing.[4]

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[4] Other circuits have interpreted *Valley Forge* in similar fashion. *See Suhre v. Haywood County*, 131 F.3d 1083, 1086-87 (4th Cir. 1997) (Wilkinson, C.J.) (plaintiff who had regular contact with Ten Commandments display in county courthouse and was offended by it had standing, in contrast to plaintiffs in *Valley Forge* who "were denied standing . . . because they had absolutely no personal contact with the alleged establishment of religion"); *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (plaintiff had standing under *Valley Forge* because he "personally and directly . . . ha[d] been subjected" to the action to which he objected, and thus had "suffered an injury of a nature and to a degree the *Valley Forge* plaintiffs did not."), *aff'd with respect to standing, but rev'd on other grounds*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc); *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. . 1986) (Posner, J.) (plaintiffs who are offended by religious display that they have direct contact with, and, as a result, go out of their way to avoid it, have standing under *Valley Forge*); *accord Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001); *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336, 1342 (2d Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989); *Hawley v. City of Cleveland*, 773 F.2d 736, 739-40 (6th Cir. 1985); *American Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098, 1101 (11th Cir. 1983); *see also ACLU v. Township of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001) (Alito, J.) (noting that other circuits had held that, under *Valley Forge*, direct unwelcome personal contact with a religious display was sufficient injury for Article III standing, and holding that plaintiffs lacked standing because they only alleged direct personal contact with

Petitioners' interpretation of *Valley Forge* is at odds with this Court's recurring concern, expressed both before and after *Valley Forge*, that legal rules not require the government to inquire into whether a private person's conduct or beliefs are religious in nature. *See, e.g., Gillette v. United States*, 401 U.S. 437, 457 (1971) (noting the dangers of "state involvement in determining the character of persons' beliefs and affiliations," and deciding "what is or is not religious.") (internal quotations omitted); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 450 (1969) (Establishment Clause precludes courts from "determin[ing] matters at the very core of a religion - the interpretation of particular church doctrines and the importance of those doctrines to the religion"); *see also New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . "). Petitioners' reading of *Valley Forge* defies those teachings because it calls on judges to evaluate standing by ascertaining whether a belief is religious. Petitioner's argument that Respondent lacks standing to object to a cross because he is Catholic is like arguing that the Jewish plaintiffs in *Lee v. Weisman*, 505 U.S. 577 (1992), lacked standing to object to a rabbi's prayer. This Court held otherwise. *See id.* at 584 (holding that plaintiff has standing because she attends school where rabbi will deliver nonsectarian prayer at

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an earlier religious display, not later version of the display that was erected before the litigation began).

graduation).

Petitioners compound their erroneous interpretation of Establishment Clause standing by contending that the supposed "ideological nature of respondent's objection" to the cross is manifested in his attempt to "premise his *own* standing on the asserted rights of *third parties*" who were precluded from engaging in expression (religious or otherwise) at Sunrise Rock. Pet. 14. Petitioners misstate the meaning of Respondent's invocation of third party rights in this case. The government's treatment of third parties speaks to the merits of Respondent's claim, not to his standing to bring it. The government's refusal to allow third parties to place other religious symbols at Sunrise Rock, and its history of preferential treatment of the cross, reflect impermissible endorsement of religion under the Establishment Clause. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) (giving sectarian private religious speech preferential access to government land would violate the Establishment Clause). As both lower courts correctly understood, Respondent is personally confronted with, and offended by, the government's favoritism of the cross over other symbols, religious or otherwise, and he sues to redress his own offense. Petitioners' reliance on third-party standing cases is inapposite.

B. The Circuit Conflict Petitioners Have Identified Is Irrelevant To This Case.

Petitioners identify circuit disagreement over whether, for purposes of standing to bring religious display cases, a plaintiff need only demonstrate that

he has unwelcome exposure to the display, as the Tenth and Fourth Circuits have held, or must also demonstrate that he has altered his behavior to avoid the display, as the Seventh Circuit has held. Pet. at 16-17. While the Seventh Circuit's standard requiring both unwelcome exposure and alteration of behavior is plainly incorrect under *Valley Forge*,[5] the purported conflict between that standard and the standard in the Fourth and Tenth Circuits is irrelevant in this case. Respondent has had unwelcome exposure to the cross *and* has taken on, and will continue to take on, special burdens to avoid that exposure. Pet. 107a, 123a. Thus, Respondent would have standing under the Fourth and Tenth Circuits' standard, as well as the Seventh Circuit's standard, and resolution of the circuit split would have no bearing the outcome of the standing inquiry here.

* * *

In sum, the lower court rulings acknowledging Respondent's standing are consistent with well-established doctrine and unexceptional in nature. Petitioners misread those rulings and this Court's precedents – and highlight an irrelevant circuit split – all in an attempt to generate an issue worthy of this Court's review. Respondent's standing does not present such an issue.

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[5] This Court expressly stated that Article III injury in an Establishment Clause case can be based on either an individual's direct and unwelcome contact with government support for religion *or* an individual's incurring burdens to avoid that contact. *Valley Forge*, 454 U.S. at 486 n.22.

II. THE COURT OF APPEALS' DECISION ON THE MERITS DOES NOT WARRANT REVIEW

Petitioners argue that review is warranted because the lower courts' decisions (1) conflict with Seventh Circuit precedent; (2) disrespect Congress; and (3) require the destruction of the cross in contravention of a congressional mandate. Each of these arguments is incorrect and none supports review.

A. The Court of Appeals Decision Does Not Conflict With The Approach Or Outcome Of Seventh Circuit Cases

Petitioners contend that the approach of the Ninth Circuit in this case, and the result it reached, conflict with the approach of the Seventh Circuit and the results that court has reached in two cases addressing whether a transfer of government land to a private party cured an Establishment Clause violation. Pet. 20-22 (citing *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005)). Petitioners are wrong on both counts. The Ninth Circuit employed the same approach as the Seventh Circuit. And, to the extent that the result in this case diverges from that of the Seventh Circuit cases, it is solely because of myriad factual differences between this case and those Seventh Circuit cases.

1. *The Ninth Circuit And Seventh Circuit Approaches Do Not Conflict*

In arguing that the Ninth and Seventh

Circuits are in direct conflict. Petitioners ignore that the Ninth Circuit explicitly adopted the approach employed by the Seventh Circuit in *Marshfield*. Pet. 76a. Moreover, both circuits held that the mere transfers of land on the facts presented had *not* cured the Establishment Clause violation. *See Marshfield*, 203 F.3d at 496 ("the sale [of land on which a religious symbols rests to a private party] has given this sectarian message preferential access to Praschak Wayside Park"). Petitioners barely hint at the actual holding of *Marshfield*, relegating it to a footnote at the very end of their discussion of the case. Pet. 22-23 n.9.

Citing *Marshfield*, the Ninth Circuit stated that to determine whether a transfer of government land to private parties has ended an Establishment Clause violation, a court must "examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. 76a (citing *Marshfield*, 203 F.3d at 491). The Seventh Circuit's approach is virtually identical. It, too, "look[s] to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491.

Nevertheless, Petitioners assert that there is a circuit conflict because the Seventh Circuit purportedly applies a "presumption" that a transfer of government land to private parties remedies any Establishment Clause violation, while the Ninth Circuit does not. Pet. 22. However, the Seventh Circuit did not state in either *Marshfield* or *Mercier* that it would apply a presumption regarding the effect of a transfer of public land to private parties.

No form of the word presume or presumption appears in that opinion or in *Mercier*. Rather, *Marshfield* merely states that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Marshfield*, 203 F.3d at 491; *Mercier*, 395 F.3d at 701 (same).

"To the extent" that this language from the Seventh Circuit was meant to create a presumption that a land transfer will cure an Establishment Clause violation absent "unusual circumstances," the Ninth Circuit "decline[d] to adopt" that presumption. Pet. 25a; 36a. Regardless whether the Ninth Circuit's initial reading of the Seventh Circuit decisions is correct or not, it does not reflect any significant difference in the Establishment Clause analysis applied by the two courts. The Ninth Circuit, relying on this Court's precedents, engaged in a fact-specific inquiry to determine whether the land transfer was sufficient to remedy the Establishment Clause violation. Pet. 75a-76a. The Seventh Circuit's approach is effectively the same. In both *Mercier* and *Marshfield*, the Seventh Circuit took pains to stress that the transfer of public land to private parties would not end an Establishment Clause violation in every case: rather, each case had to be evaluated on its own facts. As the Seventh Circuit stated:

> The Supreme Court, and this court, have emphasized the case-by-case nature of a court's review of an alleged Establishment Clause violation. . . The same holds true for efforts to end a violation. Simply because we find in this case that the sale by the City of La

> Crosse did not violate the Establishment Clause *does not mean, as Marshfield made clear, that every such sale would be permissible.*

Mercier, 395 F.3d at 702 (internal citations omitted) (emphasis added); *see also Marshfield*, 203 F.3d at 491. In sum, there is no conflict between the approaches of the Seventh and Ninth Circuits: both are fact-specific and both look to the same sorts of facts for their constitutional consequences.

2. *Factual Distinctions Explain The Differing Results Between This Case And The Seventh Circuit Cases*

There are numerous factors in this case, absent in *Marshfield* or *Mercier*, that render the Section 8121 land transfer insufficient to terminate the Establishment Clause violation. These factors would constitute "unusual circumstances" within the meaning of the Seventh Circuit's decisions in *Marshfield* and *Mercier*, thereby raising serious questions under those cases about whether Section 8121 had effectively ended the already-adjudicated Establishment Clause violation. There is no reason to believe that this case would have come out differently had it been litigated in the Seventh Circuit; thus Petitioners' claim of a circuit conflict with the results here and in *Marshfield* and *Mercier* is illusory.

First, and most obviously, the cross in this case will remain designated a national memorial even after the transfer. *See* Pub. L. 107-117 § 8137 (2001); BIO App. 1a. By contrast, in neither *Marshfield* nor *Mercier* were the religious symbols

designated government memorials, and thus they did not have that hallmark of continued government imprimatur after the transfer.

The Seventh Circuit reasoned that transfers of government land on which religious symbols sit are, absent unusual circumstances, generally an effective way to end an Establishment Clause violation caused by the symbol on the land because reasonable observers will assume, post-transfer, that the religious expression reflected in the symbol is that of the new, private owner of the property, not the government. *Marshfield*, 203 F.3d at 491.[9] Petitioners make no effort to explain how the cross would become solely the expression of a private party following the Section 8121 transfer when the property on which it sits remains a congressionally designated national memorial.

A second fact-based distinction between this case and *Marshfield* and *Mercier* is the continued government entanglement with the cross in the Preserve following the Section 8121 transfer. Because the cross is to remains a national memorial post-transfer, NPS necessarily will continue to exercise "supervision, management and control" over it. 16 U.S.C. § 2; *see also* 16 U.S.C. § 1; Pet. 78a-79a. The government exercised no such "supervision, management and control" following the land

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[9] And yet (as Petitioners acknowledge), even in *Marshfield*, the Seventh Circuit remanded "to require additional measures, such as fencing and signs around the transferred land, that would inform a reasonable observer that the [religious display] was on private land and was not endorsed by the government." Pet. 22-23 n.9 (citing *Marshfield*, 203 F.3d at 497).

transfers in *Marshfield* or *Mercier*. Indeed, a prime example offered by the Seventh Circuit of "unusual circumstances" that would raise a fact-specific question about whether a land transfer case cured an Establishment Clause violation was a sale that "left the [government] with continuing power to exercise the duties of ownership." *Mercier*, 395 F.3d at 702. And in *Marshfield*, it was precisely the government's cessation of ownership duties over the land on which the religious symbol rested that led the Seventh Circuit to conclude that the transfer did not violate the Establishment Clause. *Marshfield*, 203 F.3d at 493.

Petitioners contend that the Ninth Circuit incorrectly interpreted federal law in concluding that the NPS would retain "various rights of control over the cross and the property," Pet. 78a, because NPS supervision applies only to federal land. Pet. 27. However, the very statute Petitioners cite, 16 U.S.C. § 1, provides that the NPS "shall promote and regulate the use of Federal *areas* known as national parks, monuments, and reservations. . . ." 16 U.S.C. § 1 (emphasis added).[7] In other words, national monuments are "Federal areas" under 16 U.S.C. § 1, regardless of whether they are on federal or private land.[8] If Congress had wanted to limit the NPS's

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[7] Petitioners did not contest below, or in their Petition to this Court, that the NPS's duties with respect to national monuments applied also to national memorials. They argued only that the NPS's duties of "supervision, management, and control" applied to national memorials on federal land, not private land. Pet. 27.

[8] Other provisions of federal law also demonstrate that national monuments may be located on private land. For example, 16

jurisdiction to national monuments or memorials on federal lands, it could have done so, as it has done in other statutes. *Compare* 7 U.S.C. § 2814 (requiring federal agencies to "develop and coordinate an undesirable plants management program for control of undesirable plants on Federal lands under the agency's jurisdiction."). Under statutory construction principles, Congress's failure to use the term "federal lands" in 16 U.S.C. § 1 means that the provision should be interpreted to extend to "federal areas" that are not located on "federal land." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 & n.2 (1987) (discussing statutory construction implications of Congress's use of a term in one statute that it failed to use in a second statute). Furthermore, the land transferred by Section 8121 will remain within the boundaries of the Preserve, and thus under the jurisdiction of the NPS. *See* 16 U.S.C. §§ 410aaa-42 and 410aaa-43.[9]

U.S.C. § 431 provides that the President may designate national monuments and that "when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract . . . *may be* relinquished to the government." (emphasis added). If the tract on which the national monument rests is not relinquished to the government (and it does not have to be under Section 431), then the tract would remain in private hands, notwithstanding the presence of a national monument on it.

[9] Petitioners insist that "because the NPS can install a replica plaque before the land exchange is complete," the provision in Section 8137 calling on the Secretary of Interior to spend funds to acquire and install a plaque at the site "does not require any ongoing federal involvement in the memorial." Pet. 27. That assertion is not supported by the record. In the absence of that record support, the land transfer provides a form of easement

A third fact-based distinction between this case and *Mercier* and *Marshfield* is the reversionary clause in § 8121(e). That clause requires that the transferred land be returned to federal government ownership if the VFW does not "maintain the conveyed property as a memorial commemorating the United States participation in World War I." Pub. L. 108-87, § 8121(e) (2003); Pet. App. 148a. As the Ninth Circuit correctly noted, it is well-established that reversionary clauses in government land transfer provisions constitute a form of continuing government control over the property. Pet. 80a (citing cases). These cases conform with a basic tenet of property law that a reversionary interest is an ownership interest in real property. *See, e.g., Restatement (Second) of Property: Donative Transfers* § 1.4 (1983). Moreover, the reversionary clause contained in Section 8121 is directly tied to the government's ongoing interest in maintaining the sectarian religious symbol at the heart of this case. By contrast, the reversionary clause in *Marshfield* was entirely unrelated to the religious symbol on the land that was transferred. *Marshfield*, 203 F.3d at 190 (deed contained a covenant running with land transferred to private party, the only effect of which is to restrict use of the parcel to public park purposes). In *Mercier*, the government did not retain

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for the government to enter onto the property, thereby both depriving the new owner of one of the traditional bundle of property rights that constitutes ownership of real property – the right to exclude others – and perpetuating the government's entanglement with the land post-transfer. No such easement was retained by the government in either *Marshfield* or *Mercier*.

any future interest in the transferred land.

Petitioners contend that the Ninth Circuit misapprehended the effect of the reversionary clause, which, they assert, does not require that the VFW keep the cross, so long as it maintains the land as some kind of a war memorial. Pet. 25-26. Petitioners ignore, however, that 18 U.S.C. § 1369 prohibits, in pertinent part, injuring or destroying any monument "commemorating the service of any person or persons in the armed forces of the United States" if "the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government." Given the cross's designation as a national memorial by Congress, and the fact that the land on which the cross is located is within the boundaries of the Preserve, the cross remains "under the jurisdiction of the federal government" for purposes of Section 1369. *See* 16 U.S.C. §§ 410aaa-42, 410aaa-43 (providing for the transfer of approximately 1.4 million acres in the boundary of the Mojave National Preserve from the BLM to the "administrative jurisdiction" of the Director of the NPS).[10] In light of 18 U.S.C. § 1369, the VFW may well be required to maintain the cross under penalty of federal law. While courts may generally impute

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[10] Land within the boundary of the Preserve includes privately owned land. *See* 16 U.S.C. § 410aaa-56 (permitting the Secretary to acquire privately owned lands "within the boundary of the [Mojave National P]reserve"); *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983) (observing that the phrase "within the boundaries" of the Ozark National Scenic Riverways "incorporate[s] federal, state, and private land, and . . . makes no distinctions on the basis of ownership").

expression on private land to its private owner, that understanding would not hold, where, as here, the private owner is arguably *required* by federal law to maintain the expression.

However, even if Petitioners are correct that neither § 8121(e) nor any other federal law requires that the VFW keep the cross in place, their arguments provide no reason for this Court to grant review. A reversionary interest is an ownership interest in the property that the government retains. Here, the reversionary clause will likely influence the VFW's decisions about how it uses its property because maintaining the cross is the easiest and cheapest means of preventing reversion to the government. Thus, the clause is one piece of information that would inform the reasonable observer's conclusion that the government is not, through the Section 8121 land transfer, attempting to disassociate itself from a sectarian symbol.

The Ninth Circuit's ruling that Section 8121 did not cure the Establishment Clause violation also rested in part on the fact that the land transfer was not accomplished through normal statutory channels. One such channel is the general land transfer statute providing for the Secretary of Interior to exchange federal land for non-federal land. Another channel is found in a specific statute that addresses land exchanges within the Preserve. Pet. 81a-82a (citing statutory provisions governing land exchanges by the Secretary of Interior and in the Mojave Preserve). The land transfer here was not effectuated through either of those ordinary methods. Instead, it was enacted as a special provision in an appropriations bill, and was

essentially a private bill benefitting a particular association (the VFW) and particular individuals (the Sandozes).

This Court has held that governmental action involving religion taken outside the normal statutory process may reflect an Establishment Clause violation. In *Board of Educ. Of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994), for example, the Court held that a school district, the boundaries of which were coextensive with the boundaries of a devoutly religious village, and that was created by "a special Act of the legislature," rather than through the "State's general laws governing school district reorganization," violated the Establishment Clause. *Id.* at 700-01. The Court's decision was grounded in the abnormal circumstances surrounding the creation of the district, which raised concerns that the government was not, and would not, exercise its school district reorganization "authority in a religiously neutral way," as the Establishment Clause requires. *Id.* at 703.

Here too, the government's past favoritism at Sunrise Rock for religious expression over other forms of expression -- combined with exclusion of everyone but the Sandozes and the VFW from the opportunity to obtain the land on which a sectarian religious symbol rests -- gives rise to a concern that the government is not using its land transfer authority in a religiously neutral manner.

The factual history here is significantly different from *Marshfield* and *Mercier*, making the identity of the beneficiaries of the Section 8121 transfer more relevant to the analysis than the

identity of the beneficiaries of the transfers in the Seventh Circuit cases. Long before the government had designated the cross a national memorial, it had allowed Mr. Sandoz to come onto federal land to erect a Latin cross, without obtaining the permission required by federal law, but forbade, under threat of arrest and prosecution, someone else from coming onto the same land to erect a Buddhist memorial. Pet. 56a-57a.[11] This favoritism for expression of one particular religion violates the Establishment Clause, *see Pinette*, 515 U.S. at 766 (plurality opinion), and distinguishes the facts of this case from those of the Seventh Circuit cases. In neither *Marshfield* nor *Mercier* was there a track record of governmental favoritism, in the form of preferential access to government land for one religion over another. Nor is there any reason to believe the Seventh Circuit would have ignored such a history of favoritism in considering whether the government's method of transfer remedied an Establishment Clause violation.

It is these key factual distinctions that distinguish this case from *Mercier* and *Marshfield*, not, as Petitioners argue, the law applied to these facts or the circuit applying that law.

B. This Case Is Not About Deference To Congress But About The Ability Of Courts To Enforce Their Constitutional Judgments.

Petitioners assert that this Court's review is

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[11] Mr. Sandoz stated that he opposed the removal of the cross, and that if the cross were taken down, he would put it back up. Pet. 120a.

merited because, in invalidating Section 8121, the court of appeals failed to give proper deference to an Act of Congress. Pet. 23. However, none of the cases Petitioners cite concerns the level of deference a court should accord in determining whether an Act of Congress remedies an already-adjudicated constitutional violation by the federal government. Petitioners cite no case, and Respondent is not aware of any, that holds that a court that has already found a constitutional violation exists should presume that any congressional action purportedly designed to remedy that violation does so.

Seeking to bolster their deference argument, Petitioners assert that the court of appeals placed improper weight on the long history of congressional involvement with the cross in concluding that the district court had not abused its discretion in finding that purpose of Section 8121 was to avoid the effects of its prior injunction. In fact, the court of appeals acted consistently with decisions of this Court stressing the importance of the history of government involvement with religious symbols or exercises in assessing their constitutionality. *See, e.g., McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000).

Petitioners' deference argument seeks traction in the dissent from the denial of rehearing en banc, which characterized the panel decision as "'effectively announc[ing] the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering the sale of land upon which a religious symbol previously was situated.'" Pet. 29 (quoting Pet. 37a). The panel announced no

such rule. It merely held that, after applying the fact-specific inquiry employed by the Seventh Circuit and mandated by this Court's jurisprudence, and given the unusual circumstances of *this* particular transaction, the congressional land transfer did not remedy the previously-adjudicated Establishment Clause violation.

C. This Case Does Not Present the Question Whether the Cross Must be Removed, Nor Is the Land Transfer a Permissible Accommodation of Religion.

Petitioners contend that this Court should review this case because the decisions below force destruction of the cross, which, they contend, would demonstrate "hostility toward religion". Pet. 19-20. While Petitioners' argument therefore (correctly) concedes that the cross is a religious symbol, it errs in suggesting that the lower courts have required destruction of the cross. As a factual matter, the court of appeals' decision enjoining Section 8121 does not require the government to tear down the cross. It merely affirms the district court's order requiring the government to comply with the district court's injunction, which does not necessitate destruction of the cross. Pet. 85a; Pet. 146a.[12] This would be a

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[12] Although the injunction prohibits the "display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve," Pet. 146a, when the injunction was issued the government had not proposed to transfer the land on which the cross rests to a private party. Therefore the district court's initial decision did not address the propriety of that remedy. In granting Respondent's motion to enforce the injunction following the enactment of Section 8121, the district court cited

different case, for example, if the government had responded to the injunction by transferring the land on which the cross sits to the highest bidder without the NPS's continuing "supervision, management and control" over the cross and land. A remedy along those lines, which would not require the government to "tear down the cross," can be accomplished without this Court's intervention.

Petitioners fare no better with their argument that Section 8121 reflects a permissible accommodation of religion. As this Court repeatedly has stated: "Government efforts to accommodate religion are permissible *when they remove burdens on the free exercise of religion*." *County of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) (emphasis added). Those burdens must generally be government-imposed, *see Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), and the resulting accommodation cannot "single[] out a particular religious sect for special treatment."

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approvingly to the framework set out by the Seventh Circuit in *Marshfield* for evaluating when a land transfer to a private party is sufficient to remedy an already-adjudicated Establishment Clause violation, and the court of appeals did the same in affirming the grant of the motion to enforce the injunction. Pet. 90a-91a; Pet. 36a; Pet. 76a. Neither the district court nor the court of appeals held that a land transfer never would be permissible, and that the only constitutionally acceptable remedy is to remove or destroy the cross. Indeed, Respondent has proposed land transfer remedies that do not entail tearing down the cross. *E.g.*, Plaintiff's Opposition to Petition for Rehearing, at 3. Accordingly, this case does not present the question whether, as a matter of law, a land transfer from the government to a private party can *ever* remedy an Establishment Clause violation.

Kiryas Joel, 512 U.S. at 706; *id.* at 707 ("[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored."). Petitioners do not explain, nor could they, what government-imposed burden on the free exercise of religion Section 8121 lifts; nor could they justify the accommodation of only one faith's religious expression.[13]

III. THIS CASE RAISES SERIOUS MOOTNESS PROBLEMS AND THEREFORE PRESENTS A POOR VEHICLE FOR REVIEW OF THE QUESTIONS PRESENTED

Even if the questions presented here were worthy of review, this case would be an inappropriate vehicle for resolving them because changed factual circumstances likely have rendered the parties' dispute over the transfer moot.

In Section 8121, Congress expressly conveyed the land on which the cross sits to "the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E." Pet. 147a-149a. However, VFW Post 385E no longer exists. Its charter was revoked in May 2007, and therefore "the post is now defunct." BIO App. 4a. The demise of Post 385E raises a complex mootness question: Is the Section 8121 land

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[13] When this Court has upheld the placement of religious symbols on public property, it has done so in recognition of the role of religion in American society, see, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 688-90 (2005), not as an accommodation. *See Allegheny*, 492 U.S. at 601 n.51 (religious symbol on county property not permissible accommodation of religion because it does not relieve a government-imposed burden on religion).

transfer now null and void, thus rendering this case moot; or, can the transfer go forward with some other entity standing in the shoes of Post 385E, even though Congress expressly named only that particular Post as the grantee in Section 8121? As a threshold matter, this Court would have to resolve this serious mootness issue before it could turn to the questions presented by the Petition. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (mootness is a "threshold" issue because it implicates the Court's jurisdiction).

The California VFW has asserted that it is the successor in interest to Post 385E and that it therefore will assume Post 385E's rights and obligations under the Section 8121 conveyance. BIO App. 4a. Whether the state VFW can simply be substituted for Post 385E as the statutory grantee is not so clear cut, however.

In government land transfers, "nothing passes by implication." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837); *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987). Thus, when interpreting statutory land grants, this Court has admonished that "all that is granted must be found in the plain terms of the act." *City of Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 427 (1910). Here, the language of the land transfer statute is plain. Section 8121 names a specific recipient of the land grant – VFW Post 385E. The statute conveys nothing to the California VFW. To bestow rights on the California VFW thus would expand the scope of the conveyance beyond its express terms.

This is not to say that a putative successor may never assume the rights and obligations of the original grantee in a federal land transfer. For example, this Court has held that federal land can be transferred to a successor when the original grantee's rights to the property had fully vested prior to the transfer. *Stark v. Starrs*, 73 U.S. 402, 417-18 (1867); *Simmons v. Wagner*, 101 U.S. 260, 261 (1879). In such cases, once the grantee's right to the land vests, the grantee can sell or assign his rights, or direct that the land descend to his heirs upon his death. *See Cawley v. Johnson*, 21 F. 492, 495 (C.C. W.D. Wis. 1884). However, when conditions precedent are prescribed in the land transfer statute, no land can be conveyed to a successor until those conditions "have been fully performed." *McCune v. Essig*, 118 F. 273, 273-74, 280 (C.C. E. D. Wash. 1902); *see also Hall v. Russell*, 101 U.S. 503, 509-510 (1879) (grantee who died before completing four-year residency requirement of land grant statute could not transfer land to heirs because "nothing passed until all was done that was necessary to entitle the occupant to a grant of the land").

Applying these principles here, Section 8121 sets forth conditions precedent that must occur before the land is conveyed to Post 385E. In particular, the United States must be provided consideration equal to the value of the transferred land, a process that requires the conveyance of property by Mr. and Mrs. Henry Sandoz in exchange for the transferred land; an appraisal of both properties; and, if necessary, a cash equalization payment. Pet. 117a-118a. Because of the injunction enjoining the Section 8121 transfer, the statutory

conditions have yet to be satisfied. Thus, Post 385E never obtained a vested right in the federal land before its charter was revoked and therefore the land cannot be transferred to the Post's putative successor.[14]

Congress could, of course, have provided in Section 8121 for a successor to assume Post 385E's rights and obligations in the event that the Post became nonexistent prior to the completion of the conditions precedent to the transfer. *E.g.*, *McCune v. Essig*, 199 U.S. 382, 388-89 (1905) (quoting statute that stated, if grantee is dead, his widow can make necessary showing that conditions have been satisfied); *Shulthis v. McDougal*, 170 F.529, 531-33 (8th Cir. 1909) (statutes and agreements providing for land grants to tribe members specifically provided that, if recipient died before patent or deed becomes effective, title would inure to recipients heirs). But Congress issued no such directive in Section 8121. And neither the statute itself nor its legislative history provides a clear indication that Congress necessarily would have considered the state VFW to be interchangeable with the local Post group for purposes of the statutory land transfer. In the absence of any trace of Congressional intent for the land to be transferred to an entity other than Post 385E, the State VFW cannot simply appoint itself the Section 8121 transferee.

In sum, the demise of Post 385E raises difficult mootness issues that this Court would have

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[14] If it granted the Petition, this Court also would have to determine, as a legal and factual matter, whether the state VFW is the successor to Post 385E.

to address before reaching the questions presented in the Petition. These considerations render the case a poor vehicle to resolve those questions and thus furnish an additional ground for denying the Petition.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully Submitted.

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Dated: January 8, 2009

APPENDIX

Pub. L. 106-554, 114 Stat. 2763, 2763A-230, § 133 (2000)

SEC. 133. None of the funds in this or any other Act may be used by the Secretary of the Interior to remove the five-foot-tall white cross located within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15.

Pub. L. 107-117, 115 Stat. 2230, 2278-79, § 8137 (2002)

SEC. 8137. (a) DESIGNATION OF NATIONAL MEMORIAL.--The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1931 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

(b) LEGAL DESCRIPTION.--The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.

(c) REINSTALLATION OF MEMORIAL PLAQUE.--The Secretary of the Interior shall use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Pub. L. 107-248, 116 Stat. 1519, 1551, § 8065 (2002)

SEC. 8065. (a) None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of the Department of Defense who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act without the express authorization of Congress: Provided, That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.

(b) None of the funds in this or any other Act may be used to dismantle national memorials commemorating United States participation in World War I.

Veterans of Foreign Wars of the United States
Department of California

November 17, 2008

The Honorable Dirk Kempthorne
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E

Secretary Kempthorne,

In Public Law 108-87 § 812l(a)-(l), 117 Stat. 1100 (2003), Congress directed the Secretary of the Interior to convey to the Veterans Home of California--Barstow, Veterans of Foreign Wars Post #385E ("Post 385") all right, title, and interest of the United States in and to a parcel of real property (the "Property") consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107-117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

As consideration for the Property, Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569-051-11, and located in

the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian. Public Law 108-87 § 8121(b), 117 Stat. 1100 (2003).

This conveyance was subsequently enjoined by the U.S. District Court for the Central District of California. *Buono v. Norton*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005). The injunction was upheld by the U.S. Court of Appeals for the Ninth Circuit. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), reprinted as amended at *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008). The United States has petitioned the U.S. Supreme Court for a writ of certiorari. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Kempthorne v. Buono, U.S. Supreme Court No. 08-472 (Oct. 10, 2008). In May 2007, the charter of Post 385 was revoked and the post is now defunct. In accordance with Veterans of Foreign Wars By-Laws Sections 210-211 (attached as Appendix "A") and Veterans of Foreign Wars Manual of Procedure Sections 210-211 (attached as Appendix "B"), Veterans of Foreign Wars Department of California is the successor in interest of Post 385 and will assume ownership of and responsibility for the Property upon lifting of the injunction.

Respectfully,

/s/

J. Nichols Guest
State Commander

Enclosures

1510 "J" Street, Suite 110, Sacramento, CA 95814
Phone (916) 449-8850 FAX (916) 449-8832
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APPENDIX A

Authorized Attendees. Any member of the Post and those on official business shall be recognized by the Post Commander for the conduct of business.

Guests. With the approval of the Post Commander/Committee Chairman, any member or guest may attend a Post/Committee meeting. Such visiting member or guest shall have no voice unless recognized by the Post Commander/Committee Chairman, and shall have no voting privileges.

Sec. 204

Sec. 205

Sec. 206–Change of Location, Meeting Place, Day or Time.

A Post may change its chartered location, meeting place, meeting day or time as prescribed in Section 206 of the Manual of Procedure.

Sec. 207

Sec. 208–Change of Name.

A Post may change its chartered name as prescribed in Section 208 of the Manual of Procedure.

Sec. 209–Consolidation of Posts.

Two or more Posts may consolidate by authority of the Commander-in-Chief as prescribed in Section 209 of the Manual of Procedure.

Sec. 210–Surrender of Charter.

A Post may surrender its charter only upon a vote of its members as prescribed in Section 210 of the Manual of Procedure.

Sec. 211–Suspension and Revocation of Charter.

Actions by the Commander-in-Chief—Suspension. The Commander-in-Chief may suspend a Post Charter for a period of up to six (6) months for violations of the National By-Laws and Manual of Procedure.

Establishment of Trusteeship. Upon the imposition of any suspension under this section, the Department Commander shall establish a trusteeship as prescribed in Section 211 of the Manual of Procedure.

Actions by the Commander-in-chief—Revocation. The Commander-in-chief may revoke a Post Charter.

Actions by the Department Commander—Suspension. The Department Commander may suspend a Post Charter for a period of up to three (3) months.

Sec. 212–Defunct Posts.

The Commander-in-Chief shall revoke a Post's Charter if such Post has less than ten (10) members on February 1.

In the event of such a revocation, disposition of the property and trust funds of the Post shall be handled as prescribed in Section 210.

Sec. 213–Arrearages, Deficiencies and Omissions.

Any Post in arrears for any financial obligations to County Council (if applicable), District, Department and National for fees, dues, poppy money, supply money, failing to

APPENDIX B

Sec. 209–Consolidation of Posts.

Two or more Posts may consolidate upon a vote of their respective members conducted in accordance with the procedures herein set forth as follows:

1. A motion to consider consolidation shall be made and approved at a stated meeting of the Posts.
2. A committee shall be appointed by the Post Commander to investigate consolidation.
3. All Posts involved in the consolidation shall exchange a report of all assets and liabilities.
4. A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the respective Posts, consolidate upon a two-thirds (2/3) vote of the members present and voting at each stated Post meeting.
5. The Department Commander shall be notified, in writing, immediately after the meeting of the outcome of the action taken.
6. A Department representative shall conduct a joint meeting of all Posts within thirty (30) days for the purpose of determining the name, number (must be one of the consolidating Post numbers), location of the consolidated Post and the election and installation of officers. A written notice must be sent to the members of all Posts involved at least

fourteen (14) days in advance. All actions, with the exception of the election of officers, must be approved by a two-thirds (2/3) vote of the members present at the stated meeting.

7. Such facts shall be certified by the Department representative, submitted to the Department Commander for forwarding to the Commander-in-Chief who shall issue a Certificate of Charter reciting the facts of such consolidation. The Certificate of Charter shall rank from the date of the senior Post's charter.

The property of each of the Posts shall be conveyed to and become the property of the consolidated Post. All past officers in each Post shall be entitled to rank as of date of service in their respective Posts.

Sec. 210—Surrender of Charter.

A Post may surrender its charter in accordance with the procedures herein set forth as follows:

1. A motion to consider surrendering a Post charter shall be made and approved at a stated meeting of the Post. If approved, the Post Commander shall immediately provide the Department Commander with a list describing all assets and liabilities of the Post.
2. A Post may then, after at least twenty (20) days written notice to the Department Commander and members

of the Post, vote to surrender the charter upon a two-thirds (2/3) vote of the members present and voting at a stated meeting.

3. The Department Commander shall be notified immediately after the meeting, in writing, of the outcome of the vote to surrender the charter of a Post. If approved, the Department Commander shall within thirty (30) days, request that the Commander-in-Chief cancel the charter. Pending such cancellation the Post shall not dispose of any assets.

Disposition of Property. In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, shall be immediately recovered by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.

In case of surrender or forfeiture of a charter, the Department Council of Administration in the case of trust funds or trust property, or both, shall carry out the intent and purpose of such trust to the extent of such funds or property, or both.

Sec. 211–Suspension and Revocation of Charter.

1. **Actions by the Commander-in-chief–Suspension.**

   The Commander-in-Chief may suspend a post charter in accordance with the procedures herein set forth.

   a. The Commander-in-Chief shall issue a Special Order directing the Department Commander to suspend a Post Charter.

2. **Actions by the Commander-in-Chief–Revocation.**

   The Commander-in-Chief may revoke a Post Charter in accordance with the procedures herein set forth.

   a. The Post Commander shall be notified in writing of the proposed action by certified mail, return receipt requested. to the address of record.

   b. Unless the Post Commander notifies the Commander-in-Chief in writing by certified mail, return receipt requested. within fifteen (15) days of receipt of notice that the Post desires a hearing. the revocation of the Charter shall be effected.

   c. In the event that the Post requests a hearing. said hearing shall be held within thirty (30) days of the receipt of the notice. A hearing will be scheduled

at a time and place and in a manner prescribed by the Commander-in-Chief.

d. The Commander-in-Chief shall decide the matter within thirty (30) days.

e. If the Post is not already under suspension at the time that the notice of proposed revocation is given, the Post shall thereafter be under suspension.

f. The Commander-in-Chief may at his discretion, and after hearing the matter if so requested, revoke the charter of the Post by issuing a Special Order to that effect.

3. Actions by the Department Commander—Suspension.

The Department Commander may suspend a Post Charter in accordance with the procedures herein set forth.

a. The Department Commander shall issue a Special Order suspending a Post Charter and appointing trustees consisting of three to five members. Pursuant to a written grant of powers and limitations, such trustees shall carry on the business and affairs of the Post during the period of suspension. The acts and actions of the trustees shall be subject to the approval or disapproval of the Department Commander.

b. The Post Commander shall be notified in writing of the action by certified mail, return receipt requested, to the

address of record or by personal delivery by a designated representative.

c. The Department Commander shall notify the Commander-in-Chief in writing within two (2) days.

d. While under suspension no meetings shall be held in the name of the Post or organization, except for the sole purpose of the discussion of the cause, effect or removal of the penalty and no funds of the Post shall be expended or obligations incurred during and while the order of suspension is in force and effect except as may be expended or obligated by the trustees appointed under this subsection.

e. Following an initial suspension period as provided in this subsection, the Department Commander shall revoke or extend the suspension for an additional period of time not to exceed ninety (90) days.

4. Actions by the Department Commander—Revocation.

The Department Commander may at any time during the suspension period, recommend revocation of the Post Charter to the Commander-in-Chief.

Sec. 212–Defunct Posts. (See Section 212 By-Laws)

Sec. 213–Arrearages, Deficiencies and Omissions.

If a Post has any outstanding financial obligations due National Headquarters that remain unpaid on September 1, the amount due will be deducted from future dues payments until balance due is paid in full.

Sec. 214–Solicitation of Funds.

Posts may solicit funds or contributions or otherwise engage in fund-raising activities

REPLY BRIEF

No. 08-472

In the Supreme Court of the United States

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Over a five-judge dissent from denial of rehearing en banc, the Ninth Circuit invalidated an Act of Congress and required the federal government to remove a cross that has stood for 75 years as a memorial to fallen service members. While respondent argues that there is no circuit split on that question, the Ninth Circuit's invalidation of an Act of Congress based on an erroneous and potentially far-reaching constitutional theory would warrant review even in the absence of a circuit split. Moreover, the court of appeals' initial decision expressly (and correctly) acknowledged the conflict. The court of appeals also impugned Congress's purpose and created, rather than avoided, constitutional difficulties in construing the relevant legislation. Respondent's defense of the decision below rests on equally strained interpretations of the underlying legislation. Respect for

the coordinate legislative branch calls, at a minimum, for plenary review of the Ninth Circuit's decision.

I. THE COURT OF APPEALS' HOLDING ON STANDING WARRANTS REVIEW

At the outset, this case presents a threshold standing ruling that would warrant review even in its own right because it is important, it oversteps judicial bounds in the course of refusing to give effect to an Act of Congress, and the courts of appeals are divided on the correct interpretation of this Court's Establishment Clause standing cases. Pet. 10-18. Respondent asserts (Br. in Opp. 8, 9-10) that his "direct and unwelcome contact" with the cross alone creates standing to bring an Establishment Clause challenge. That is contrary to this Court's precedents, because respondent must demonstrate an *Establishment Clause* injury to pursue an Establishment Clause claim. See Pet. 11-12. And this Court has made clear that, while a person may have a "'spiritual stake' sufficient to confer standing," "the psychological consequence presumably produced by observation of conduct with which one disagrees" does not confer standing, no matter how "firmly committed to the constitutional principle of separation of church and State" the plaintiff might be. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 486 & n.22 (1982) (*Valley Forge*) (quoting *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970)).

Respondent has failed to show any injury beyond the one that *Valley Forge* held to be inadequate. In contrast to the plaintiffs in all of the cases on which he relies, respondent has testified that he is a practicing Roman Catholic who does *not* "find the cross, itself, offensive,"

and that he objects to the cross at issue here only because it is located on "property that is not open to *others* to place freestanding signs or symbols that express *their* views or beliefs." 03-55032 C.A. E.R. 27, 59 (emphases added). In light of those clear statements, this case does not require the Court to inquire into whether respondent's injury is truly spiritual in nature, see Br. in Opp. 12-13, because respondent has conceded that it is not. Nor does the government assert, as respondent claims (Br. in Opp. 12), that respondent lacks standing simply because he is a Catholic. Instead, respondent lacks standing because he has asserted only an ideological objection concerning *other peoples'* rights to erect *other symbols* in the event that *they* wish to do so. Pet. 12-14.

Significantly, respondent does not appear to defend the court of appeals' rationale for finding standing. Respondent suggests (Br. in Opp. 9) that *Valley Forge* addressed only taxpayer standing. But that contention is manifestly wrong. After finding that the plaintiffs lacked standing as taxpayers, *Valley Forge*, 454 U.S. at 482, the *Valley Forge* Court considered whether they had "alleged any other basis for standing," *ibid.*, and concluded that they lacked standing as citizens because they did not identify an injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees," *id.* at 485; see *id.* at 482-487. As noted, respondent here cannot even point to that "psychological consequence," because he does not find the cross itself offensive.

Unlike respondent, the court of appeals appeared to acknowledge that a plaintiff must identify an additional injury accompanying such a psychological consequence, and it held that respondent had incurred such an injury because, instead of coming into contact with the cross,

he chose to drive on a different road. See Pet. App. 106a-107a. As explained in the petition for a writ of certiorari and not directly disputed by respondent, however, if respondent cannot establish standing by viewing the cross, he certainly cannot establish standing by electing *not* to view the cross. Pet. 15-16. The government's point is not, as respondent claims (Br. in Opp. 9 n.3), that respondent lacks standing because he is free not to view the cross. Instead, the point is that respondent cannot establish standing by choosing to substitute a self-inflicted injury for another injury that is itself inadequate to create standing. Pet. 15-16.

There is, moreover, disagreement among the courts of appeals on the significance of plaintiffs' decisions to alter their behavior to avoid direct contact with a religious symbol. Pet. 16-18. The court of appeals' reliance on respondent's decision to drive along a different route makes those cases relevant. Indeed, the decision below relies on several of the Ninth Circuit decisions that comprise part of the circuit split. See Pet. App. 107a. That only underscores the need for this Court's guidance on the types of injuries that confer standing in Establishment Clause cases. Pet. 18.

II. THE COURT OF APPEALS' INVALIDATION OF AN ACT OF CONGRESS WARRANTS REVIEW

On the merits of the Establishment Clause question, respondent argues primarily (Br. in Opp. 15-26) that the courts of appeals are not divided on the question presented here. Even if that were correct, and it is not, that would not eliminate the need for this Court's review.

A. The invalidation of an Act of Congress itself is normally sufficient to warrant this Court's review.

Such review is especially important here because tearing down religious symbols can "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); see *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Congress's decision to divest itself of the privately erected cross—which has stood in a remote desert location for three-quarters of a century as a memorial to fallen service members—was an eminently sensible way to resolve the Establishment Clause issue without tearing down the cross, which could demonstrate hostility toward religion and callousness toward fallen service members and those who have sought to honor them. Pet. 19-20.

Respondent contends (Br. in Opp. 28) that the court of appeals' decision does not require removal of the cross because the government could, instead, sell the land to the highest bidder. It is far from clear, however, that the Ninth Circuit's decision would permit that course, especially if the Veterans of Foreign Wars (VFW) or a religious organization were the purchaser. See Pet. App. 31a. Moreover, selling the land to the highest bidder could amount to nothing more than outsourcing the tearing down of the cross. Congress's decision to sell the land for fair value to the VFW—the private organization that erected the memorial in the first place—is a far more tailored remedy than an indiscriminate sale. In any event, it is a choice that Congress was entitled to make.

B. Especially because the application of the Establishment Clause is invariably fact-dependent, see, *e.g.*, *McCreary County* v. *ACLU*, 545 U.S. 844, 867-868 (2005), the absence of a square circuit split would not detract from the need for this Court's review of the im-

portant constitutional question presented. The court of appeals' decision does, however, "squarely contradict[]" decisions of the Seventh Circuit. Pet. App. 41a (O'Scannlain, J., dissenting). That provides all the more reason for this Court's review. As the court of appeals acknowledged in its initial opinion, the Seventh Circuit presumes that the government may sell its property to avoid inappropriate endorsement of religion; the Ninth Circuit does not. *Id.* at 25a n.13.

In a pair of cases—*Freedom from Religion Foundation, Inc.* v. *City of Marshfield*, 203 F.3d 487 (2000), and *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693 (2005)—the Seventh Circuit held that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *City of Marshfield*, 203 F.3d at 491. Respondent argues (Br. in Opp. 17) that the Seventh Circuit's test does not amount to a presumption because "[n]o form of the word presume or presumption appears" in either *City of Marshfield* or *Mercier*. That is just semantics. If the government may transfer property to end an alleged Establishment Clause violation in all but "unusual circumstances," *City of Marshfield*, 203 F.3d at 491, then such transfers are *presumptively* permissible. See *Mercier*, 395 F.3d at 705 ("*Marshfield* makes clear that *in most cases*, a government can remedy a potential Establishment Clause violation by selling the real property where the religious monument sits.") (emphasis added).

Respondent contends (Br. in Opp. 17) that the division between the Seventh and Ninth Circuits "does not reflect any significant difference in the Establishment Clause analysis applied by the two courts," because both courts "engage[] in a fact-specific inquiry to determine

whether the land transfer was sufficient to remedy the Establishment Clause violation." That misses the point. Of course, in determining whether unusual circumstances exist to set aside a land transfer, the Seventh Circuit evaluates each case on its own facts. But the key is that, in evaluating those facts, the Ninth Circuit applies a stricter legal standard than the Seventh Circuit.[1]

C. Moreover, respondent's factual distinctions, like those drawn by the court of appeals, only underscore the need for this Court's review. Pet. 24-28. As Judge O'Scannlain explained, the Ninth Circuit panel "flout-[ed]" basic principles of judicial review by (i) failing to accord any deference to Congress's judgment in this sensitive area, and (ii) reading the relevant statutes in such a way as to create, rather than avoid, constitutional difficulties that do not exist under a straightforward interpretation of the statutes. Pet. App. 45a; see Pet. 23-24.

Respondent makes no attempt to defend the court of appeals' inaccurate characterization of the land transfer as carving out a tiny donut hole in a vast federal area. Pet. App. 85a. Instead, he primarily argues (Br. in Opp. 19) that there would be "continued government entanglement with the cross" because Congress designated

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[1] Respondent misleadingly states (Br. in Opp. 16) that *City of Marshfield* ultimately found an Establishment Clause violation. *City of Marshfield* upheld the transfer of a parcel of land in a public park, 203 F.3d at 493, and remanded for the district court to require measures, such as signs, that would differentiate between the private and public land, *id.* at 497. See Pet. 22 n.9. Here, in contrast, the Ninth Circuit invalidated the land transfer itself. Moreover, Congress expressly required the installation of a plaque making clear that the cross had been erected by the VFW to commemorate the war dead (as opposed to by the government to establish religion), and the Ninth Circuit counted that fact *against* the government. Pet. App. 26a, 31a-32a.

the war memorial as a national memorial. That designation has no legal significance here whatsoever. Congress may declare a national memorial on either federal or private land. See, *e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1031, 118 Stat. 2044 (America's National World War I Museum); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1080, 110 Stat. 2670 (National D-Day Memorial); Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164 (Benjamin Franklin National Memorial). Such a declaration, standing alone, does nothing to transfer any regulatory authority over private property to the government. For that reason, respondent is incorrect (Br. in Opp. 23) that the VFW might be required to maintain the cross post-transfer, because the land will no longer be "owned by, or under the jurisdiction of, the Federal Government." 18 U.S.C. 1369(b)(2). Moreover, the National Park Service's limited authority over private inholdings within the boundaries of federal areas, see Br. in Opp. 20-21, is likewise irrelevant. That limited authority would not allow the government to require the VFW to display the cross (or any other symbol) on the VFW's own land, and respondent points to nothing remotely suggesting otherwise. Simply put, once the land is transferred, the cross and the decision whether to display it, modify it, or remove it will be up to the VFW, not the government.

While respondent renews some of the court of appeals' other factual points, the government has addressed most of those points in the petition for a writ of certiorari (at 24-28), and any further elaboration is necessarily reserved for a merits brief, not a petition-stage one. Moreover, as Judge O'Scannlain observed, the court of appeals' reliance on some of those factual issues

cannot be reconciled with the Seventh Circuit's treatment of the same issues in *City of Marshfield* and *Mercier*—a point that further underscores both the circuit split and the need for this Court's review. Pet. App. 51a n.10; see Pet. 24-26.

In any event, the court of appeals' judgment ultimately does not appear to turn on factual matters. Instead, in the end, the court of appeals squarely relied on its prior opinion holding that the presence of the cross on federal land violated the Establishment Clause, Pet. App. 84a—and thereby effectively concluded that, in the Ninth Circuit's view, a land transfer is not a valid means of curing a land transfer. See Pet. 29; Pet. App. 37a (O'Scannlain, J., dissenting).

III. THIS CASE PRESENTS A LIVE CONTROVERSY

Finally, there is no merit to respondent's contention (Br. in Opp. 30) that "changed factual circumstances likely have rendered the parties' dispute over the transfer moot." After the government filed the petition for a writ of certiorari, the Department of California VFW informed the Secretary of the Interior that VFW Post 385E is now defunct, and that pursuant to the VFW's by-laws, the Department of California VFW is now the successor-in-interest to Post 385. Br. in Opp. App. 3a-4a. Thus, while Section 8121 directed that the land be transferred to Post 385E, see Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100, the Department of California VFW, as "the successor in interest of Post 385 * * * will assume ownership of and responsibility for the Property upon lifting of the [district court's] injunction." Br. in Opp. App. 4a. Because the VFW's bylaws call for the Department of California VFW to assume

ownership of Post 385E's property, see *id.* at 13a—and respondent does not appear to contend otherwise—there is no mootness concern.

Indeed, this Court has long held that the dissolution of an organization does not render a case moot where, as in this case, the lawsuit could affect the rights of the dissolved organization's successor in interest. *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944); see *United States* v. *Zolin*, 491 U.S. 554, 557 n.3 (1989) (death of a party does not render a case moot when the case could affect a party's estate). Because the California VFW will take possession of the land if the government prevails and the injunction is lifted, this case continues to present a live controversy.

Respondent nonetheless asserts that Post 385E had nothing to pass to the California VFW because "Post 385E never obtained a vested right in the federal land before its charter was revoked." Br. in Opp. 33. Post 385E's right to the land vested, however, when Congress enacted Section 8121, at which point Post 385E was entitled to conveyance of the land, at least provided that Post 385E and the other private parties were ready to meet their statutory obligations. See *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88, 92 (1834) ("A *vested right* is defined to be the power to * * * possess certain things according to the laws of the land.") (internal quotation marks and citation omitted).

Nor are the statutory obligations imposed on Post 385E and other private parties "conditions precedent that must occur before the land is conveyed." Br. in Opp. 32. Section 8121 specifies that "[i]n exchange for" and "[a]s consideration for" the land from Mr. and Mrs. Sandoz, 2004 Act § 8121(a) and (b), 117 Stat. 1100, "the Secretary of the Interior shall convey" the land at issue

to Post 385E, *id.* § 8121(a), 117 Stat. 1100. It is black-letter law that the "payment of the consideration is not a condition precedent." *Forum Inv. Co.* v. *Cement Stave Silo Co.*, 219 F. 213, 218 (8th Cir. 1914); see 3 Richard A. Lord, *Williston on Contracts* § 7:18 (4th ed. 2008); 13 *id.* § 38:5 (4th ed. 2000). And while Section 8121 requires a cash payment in the event that the exchanged properties are not of equal value, see 2004 Act § 8121(c) and (d), 117 Stat. 1100, that is simply part of the consideration, and the statute does not demand that the payment occur before the sale in any event.[2]

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

JANUARY 2009

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[2] In addition, the district court's injunction is the only reason that consideration did not pass earlier. Respondent cannot rely, and jurisdiction should not turn, on the parties' inability to consummate the land transfer sooner when it is the injunction challenged here that blocked the transaction from occurring sooner. Cf. 13 *Williston on Contracts* § 39:3 (parties cannot benefit from preventing other parties from performing conditions precedent).

AMICUS CURIAE BRIEF

No. 08-472

Supreme Court, U.S.
FILED
NOV 10 2008
OFFICE OF THE CLERK

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DIRK KEMPTHORNE,
Secretary of the Interior, et al.,

Petitioners,

v.

FRANK BUONO

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF VETERANS OF FOREIGN WARS OF THE UNITED STATES; THE AMERICAN LEGION; MILITARY ORDER OF THE PURPLE HEART; VETERANS OF FOREIGN WARS DEPARTMENT OF CALIFORNIA; AMERICAN EX-PRISONERS OF WAR IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a Congressionally chartered veterans service organization established in 1899 and representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and very recently the GI Bill for the 21st Century and developing the national cemetery system. The VFW also is instrumental in achieving disability compensation of Vietnam veterans exposed to Agent Orange, veterans diagnosed with "Gulf War Undiagnosed Illnesses," as well as many other entitlements. The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial, the Women in Military Service Memorial and numerous other memorials in the region of the nation's capital. This case is of great concern to the VFW as, upon lifting of the injunction, it will have final management and ownership responsibility of the Mojave Desert Veterans Memorial. This case also threatens many of the other veterans memorials, reaching into the hundreds,

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[1] All counsel of record received notice of Amici's intent to file this brief at least ten days before this brief was due and consented to the filing of this brief. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The American Legion – The American Legion is a veterans and community service organization representing approximately 2.6 million members plus an Auxiliary of almost 1 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first G.I. Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Ninth Circuit has a detrimental impact on its ability to honor those who have and do serve our nation's armed forces.

Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of

wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. It has also erected at least one memorial to the recipients of the Purple Heart in every state in the nation. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

Veterans of Foreign Wars Department of California – The VFW Department of California is the California arm of the VFW responsible for administering VFW programs and initiatives within the state. Accordingly, it works with the VFW membership of California to advance the mission and programs of the VFW within the state and throughout the country, such as veterans benefits and aid for the wounded. This case is of great concern to the VFW Department of California. In accordance with VFW by-laws and procedure, following the May 2007 charter revocation of Post 358 the VFW Department of California will assume ownership of and responsibility for the memorial at issue in this case upon the lifting of the injunction. This case is of great importance to the VFW Department of California as it directly affects its statewide efforts to promote the mission and ideals of the VFW in particular and service to country in general.

American Ex-Prisoners of War ("AXPOW") – AXPOW is a national service organization composed of and open to all former prisoners of war from any war involving the United States, including all former civil internees, and their families. It provides aid to American citizens who were captured by an enemy in time of war. It exists to help those captured in time of war deal with the trauma of their capture and confinement. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the nation's veterans memorials would dishonor its members who literally have been imprisoned in service to this nation and only add to their trauma.

SUMMARY OF ARGUMENT

The Ninth Circuit not only struck down as unconstitutional a veterans memorial that has stood for almost seventy-five years due solely to its use of religious imagery, it now refuses to allow the federal government to convey the memorial and the land surrounding it to the local VFW post who erected it in the first place. There is no Establishment Clause violation here. Military culture is replete with such imagery, symbols with religious origins that have taken on widely accepted meanings independent of the religions from which they were derived. But even if the memorial must be discarded because of such symbolism, certainly conveying the memorial and the surrounding land in exchange for a fair market value trade in land is a reasonable alternative. Such a

harsh and draconian measure of requiring the removal or destruction of the memorial is unnecessary and creates the perception of government hostility towards a time-honored means of honoring the nation's military veterans. Failure on the part of this Court to reverse the Ninth Circuit will cause great harm as the message of hostility to veterans will be heard and countless veterans memorials will be affected. The Court should grant Petitioner's writ of certiorari and reverse the Ninth Circuit.

ARGUMENT

I. The Mojave Desert Veterans Memorial deserves protection.

Veterans have been fighting and dying for this Country for more than two centuries. We have called upon them to make extraordinary sacrifices in the face of great danger. They have saved this nation in times of great peril, they have freed millions from the bondage of slavery and oppression and saved countless lives around the world. Yet, as a nation, we often fail to honor their service in appropriate ways. For example, after saving the world from the darkness of fascist oppression during World War II, we failed to honor their service with a national veterans memorial for more than 50 years.

As has been the case from ancient times, the tool of remembrance most often employed to honor military veterans and their service has been physical

monuments of one form or another prominently displayed in public areas.[2] These monuments have often included or been almost entirely composed of symbols that have religious significance. In that regard this nation is certainly no exception. *See, e.g.*, Pet. App. at 47a n.6. As Justice O'Connor cogently observed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottos and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).

Because governments, from the federal government down to the local township, often neglect to honor the service of veterans and the sacrifice of those lost in war with memorials, it is often left to the veterans themselves to raise the money and donate memorials that are worthy of display. Most of these efforts are led by Amici and others like them. And like many other veterans memorials, the memorial at issue in this case was donated by a local VFW post.

If these memorials were, shockingly, to be determined now to violate the Establishment Clause, how are these governments to cure the defect? Must they tear them down and wound the spirit of veterans and

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[2] Occasionally, as is the case with the Mojave Desert Veterans Memorial, veterans have erected memorials in obscure and remote places.

the families of fallen soldiers? Such an extreme response to the lawsuit of a passing heckler seems, at the very least, inappropriate.

A. A cross is a common symbol honoring the courage and sacrifice of veterans of the First World War.

The mechanized nature of the First World War changed forever the face of modern warfare. None were prepared for the massive loss of life inflicted in that war by the large scale implementation of the machine gun and a mechanized cavalry. Horrors such as England's "Million Dead," many of whom had been volunteers, took the nation's embroiled in that war wholly by surprise. Along with the sacrifice of almost an entire generation of Western Europe with so little discernable justification came the need to commemorate that sacrifice in a visible, corporeal manner. Memorials to the fallen were erected across the continent. In short order, one of the premier symbols of remembrance used for these memorials became Sir Reginald Blomfield's Cross of Sacrifice, a lone cross emblazoned with a sword. Accordingly, through the years, with its roots in Blomfield's much heralded design, the symbol most associated with remembrance of World War I became a lone cross.

Thus, in 1934 the Veterans of Foreign Wars Post 2884 determined that the symbol most representative of the service of those Americans who died in the killing fields that were World War I was a lone cross.

They were not alone in this determination. The Canadian Cross of Sacrifice, dedicated on Armistice Day, 1927 in Arlington, Virginia, is a twenty-four foot granite cross that stands in honor of those Americans who with great internal conviction joined the Canadian Armed Forces to fight in World War I before the United States entered the War. The Argonne Cross, also in Arlington, sits among nineteen pine trees that represent the Argonne Forest where countless American servicemen gave their lives in the same war. The same is true for the Memorial Peace Cross in Bladensburg, Maryland, as well as countless other like memorials in countless other localities.

In Western military heritage, the image of a lone cross has become synonymous with honoring those who fell in the First World War. The meaning and appropriateness of this symbolism is widely understood and accepted. *See, e.g., Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977) (expressly recognizing testimony that "a monument with a cross is an appropriate symbol for sacrifice by men who gave their lives for their country in time of war"); *Newdow*, 542 U.S. 1 at 36 (O'Connor, J., concurring) ("[f]acially religious references can serve other valuable purposes in public life"). These memorials make no partisan or sectarian statement about religion or a government's endorsement of it. Rather, they serve, "in the only ways reasonably possible in our culture, the legitimate secular purpose of . . . encouraging the recognition of what is worthy of appreciation in

society." *Newdow*, 124 S. Ct. at 36 (O'Connor, J., concurring).

B. Far from an Establishment Clause violation, religious imagery such as a cross is deeply entrenched in American military culture.

American military culture is replete with religious imagery. The Congressional Medal of Honor, for example, the nation's highest military decoration, has as its centerpiece an etching of Minerva, Roman goddess of war, fending off Discord. The Navy and Marine Corps' second highest military honor is the Navy Cross. The Army's second highest military honor is the Distinguished Service Cross. The Air Force's second highest military honor is the Air Force Cross. Each of the services also recognize the highly distinguished Distinguished Flying Cross as an honored military decoration. In the American military, the cross is universally recognized as an emblem of honor and memorial for those to whom it is awarded and those for whom it is erected.

The military's incorporation of religious imagery evinces no more endorsement or establishment of religion than the Shriners, known for their philanthropic efforts to provide hospitals for children, use of the Islamic Star and Crescent symbol indicates their adherence to Islam. The cross has been incorporated by the Red Cross and the medical community at large – military medicine, in particular – as a symbol of

healing and service. Predictably, a pluralistic culture's exposure to various religions has resulted in a secular incorporation of the more admirable, universal ideals the religions represent, to include the use of that religion's symbols.

Military culture is no different. The armed forces' use of religious imagery is no more than the recognition that the highest ideals of military service, namely valor, selflessness and sacrifice, have been best exemplified by religious imagery. There could be few if any symbols in Western military heritage more appropriate to honor exemplary service and the giving of one's life to save another than a cross, a universal symbol of beneficent sacrifice. Among the nation's military veterans there are none more deserving of such honor than the fallen, those who braved the horrors of the battlefield and died there so that others might live and breathe free. In the same way, there are none more qualified to determine what symbols best memorialize sacrifice of the fallen than their comrades in arms, those who know firsthand the conditions of their deaths and how they may best be honored and remembered.

Without appropriate action by this Court, the destruction of this and an untold number of like veterans memorials is sealed, and the rest fall deeper under the threatening shadow of a judiciary already proven hostile toward them. *See, e.g., Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc); *see also Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007) (McConnell, J., dissenting). The

veterans who fight and die for this Nation and then erect memorials honoring the sacrifice of their brethren should, at the very least, receive the opportunity to preserve this small token of remembrance in the Mojave Desert. Most who traverse that barren landscape will never see the memorial that has stood as a witness of the honor and sacrifice of World War I veterans for almost seventy-five years.

II. Removing the Mojave Desert Veterans Memorial after seventy-five years is an unreasonably hostile decision contrary to the requirements of the Establishment Clause.

This is not the first time a court has tarnished the service of veterans by demanding the removal of a memorial of remembrance. Other courts have likewise misapplied the Establishment Clause to eradicate veterans memorials designed to recognize "what is worthy of appreciation in society," namely the military service and personal sacrifice of veterans for something greater than themselves. *See, e.g., Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (a cross cannot serve as a veterans memorial without violating the endorsement test); *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993).

In fact, *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996), is the epitome of Establishment Clause catastrophe and a

perfect example of why Establishment Clause jurisprudence must be constantly revisited by this Court. Acknowledgement is not the same as endorsement. The veterans memorial at issue, a cross, was "first condemned, then twice approved, and now once again condemned, all by well-intentioned judges seeking to apply the Establishment Clause of the United States Constitution." *Id.* at 620 (O'Scannlain, J., concurring). In fact, the veterans memorial in *Eugene* was originally vindicated for the very reason that it was a veterans memorial, and thus held a secular purpose, despite that fact that it bore a cross. *See id.* at 625 n.9 ("an appropriate ceremony was conducted by the American Legion to dedicate the cross as the 'Veteran's War Memorial Monument'") (quoting *Eugene Sand and Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 344 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977))).

The memorial in this case was erected by the Veterans of Foreign Wars almost seventy-five years ago to honor the fallen of World War I. It eventually became a memorial to "the Dead of All Wars." From the start it was composed primarily of a lone cross. Though remote and out of the way, it has become an enduring symbol of honor to the nation's veterans, past and present, as is evident by the numerous times it has been replaced over its long life after falling into disrepair. Each time it has been replaced, the meaning and appropriateness of a lone cross as a memorial to the nation's military veterans has been understood and preserved. It is unreasonable to conclude, as did the Ninth Circuit, that the memorial is a violation of

the Establishment Clause and that the only solution to the alleged violation is banishment, that the memorial is so repugnant to the Constitution it must be forever removed from any land, public or, as intended by Congress in this case, private land. The 2003 conveyance of the memorial to the Veterans of Foreign Wars is an appropriate and valid measure to cure any alleged violation of the Constitution and preserve the sanctity of a long-standing memorial to the nation's war dead. The validity of such a conveyance has been expressly and repeatedly recognized by the Seventh Circuit Court of Appeals. *See Freedom from Religion Found., Inc., v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (upholding the sale of a portion of a municipal park on which stood a statute of Jesus with arms extended); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with monument of Ten Commandments). The Ninth Circuit's approach, on the other hand, would seem to "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment).

While allegations that the memorial violates the Establishment Clause are unreasonable, conveying the memorial to a private party (particularly the private party that originally erected the memorial) ensures that no one, reasonable or otherwise, could possibly perceive the memorial as a government endorsement of religion. At the same time, it renders

unnecessary even consideration of the draconian measure of dismantling a time-honored veterans memorial, a measure any reasonable person would understand not only as hostility toward religion in general but also toward the honor due the nation's military veterans in particular.

i. Without action by this Court, countless veterans memorials will perish, dishonoring the memory of those who gave their lives for a cause greater than themselves and disheartening the millions of veterans who find solace and understanding in such memorials.

There are numerous veterans memorials throughout the country that invoke religious imagery. For example, the Argonne Cross in Arlington Cemetery, erected in part through the efforts of the Argonne Unit American Legion, sits among nineteen pine trees that represent the Argonne Forest where so many American servicemen gave their lives. A simple inscription on the base of the cross reads: "IN MEMORY OF OUR MEN IN FRANCE 1917 1918."

The Canadian Cross of Sacrifice, also among the graves in Arlington Cemetery, is a twenty-four foot gray granite cross that dominates its surroundings with a bronze sword affixed to the cross. The Cross of Sacrifice was dedicated on Armistice Day, 1927, honoring those Americans, with great internal conviction, who joined the Canadian Armed Forces to fight in World War I before the United States joined the

war. Subsequently, the monument was modified to honor those that served in World War II and the Korean War.

Photo provided by Arlington National Cemetery <http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html>

In fact, in Arlington Cemetery alone, there are numerous inscriptions of religious acknowledgement permanently displayed on public property. Chaplain's Hill Monument bears the inscription, "May God Grant Peace To Them And To The Nation They Served So Well." The Confederate War Memorial bears the inscription, "Victrix Causa Diis Placuit Sed Victa Caton," which means "The Victorious Cause was Pleasing to the Gods, But the Lost Cause to

Cato" and depicts a woman extending a laurel wreath from ancient Greek religion to her fallen son. The Spanish-American War Monument bears the inscription, "TO THE GLORY OF GOD AND IN GRATEFUL REMEMBRANCE OF THE MEN AND WOMEN OF THE ARMED FORCES WHO IN THIS CENTURY GAVE THEIR LIVES FOR OUR COUNTRY THAT FREEDOM MIGHT LIVE." The Space Shuttle *Challenger* Memorial bears the inscription, " . . . put out my hand, and touched the face of God." In Washington, D.C., the Peace Monument stands as a forty-four foot high monument in the circle to the west of the Capitol at Pennsylvania Avenue and First Street, N.W. This war memorial was erected in 1877-78 to commemorate the naval deaths at sea during the Civil War. Among the ancient Greek classical figures, Mars, the god of war and Neptune, the god of the sea are depicted, as well as the figure Victory, holding a laurel wreath. The Peace Memorial in Gettysburg bears the inscription, "With Firmness In The Right As God Gives Us To See The Right – Lincoln." Countless small towns and communities across the country have erected veterans memorials that bear religious inscriptions or invoke religious imagery. The City of Chicago dedicated the City Hall Memorial Plaque, a World War I and II memorial that bears the image of an angel. Blooming Grove, Texas built a Korean and Vietnam War Memorial that bears an inscription from the Book of Ecclesiastes. Such is the nature of thousands of war memorials across the country.

For some courts, these war memorials must be torn down. It is disheartening and distressing to think that Arlington Cemetery must be gutted because there are those who are offended by the religious imagery. And, under the Ninth Circuit's approach, no memorial may be preserved by conveying it to a veterans organization, probably the very organization that paid for the memorial in the first place.

The veterans memorials of this country were not lightly constructed, nor do they advance a particular creed or religion. Instead, they represent this nation's best efforts to give meaning to a cause that cannot alone be sustained by empty rhetoric and talk of abstract freedom. Veterans gave their best to this nation so that it might not perish from the Earth, but rather long endure. At the very least, we request this Court to honor their sacrifice by preserving the remnants of their mark on us all, the veterans memorials.

In times past, the defense of this nation and the preservation of the freedom of all people has been equally born by most members of American society. However, in recent decades the transformation of the military into an all volunteer force has seen the arisal of a new breed of soldier, one who serves not for personal gain or ambition but to be a part of and contribute to something greater than himself. All these veterans ask is that their time-honored memorial, standing in the middle of the desert, receive one

more opportunity to survive. *Amici*, representing more than three million veterans, deserve as much.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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(4)

No. 08-472

Supreme Court, U.S.
FILED
JUN 1 - 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 10, 2008
CERTIORARI GRANTED: FEB. 23, 2009

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(EASTERN DIVISION RIVERSIDE)

No. 5:01-cv-00216-RT-SGL

FRANK BUONO, ET AL., PLAINTIFF

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/22/01	1	COMPLAINT filed Summons(es) 60 days referred to Discovery Stephen G. Larson (mrgo) (Entered: 03/27/2001)
	* * * * *	
5/29/01	4	ANSWER filed by defendant Gail Norton, defendant John J Reynolds, defendant Mary

DATE	DOCKET NUMBER	PROCEEDINGS
		Martin to complaint [1-1] (am) (Entered: 05/29/2001)
		* * * * *
10/26/01	12	FIRST AMENDED COMPLAINT [1-1] by plaintiff Frank Buono; adding plaintiff Allen Schwartz; Summons not issued (ad) (Entered: 10/29/2001)
11/8/01	13	ANSWER filed by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin to amended complaint [12-1] (am) (Entered: 11/14/2001)
		* * * * *
3/13/02	16	NOTICE OF MOTION AND MOTION by plaintiff Frank Buono, plaintiff Allen Schwartz for summary judgment; motion hearing set for 10:00 5/6/02; Lodged propsd stmt & jgm (mrgo) (Entered: 03/14/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
3/13/02	17	MEMORANDUM OF PA IN SUPPORT by plaintiff Frank Buono, plaintiff Allen Schwartz of plf's motion for summary judgment [16-1] (mrgo) (Entered: 03/14/2002)
3/13/02	18	DECLARATION of Jeffrey S Siker by plaintiff Frank Buono, plaintiff Allen Schwartz in suppt of plf's motion for summary judgment [16-1] (mrgo) (Entered: 03/14/2002)
3/13/02	19	DECLARATION of Frank Buono by plaintiff Frank Buono, plaintiff Allen Schwartz in suppt of plf's motion for summary judgment [16-1] (mrgo) (Entered: 03/14/2002)
3/13/02	20	DECLARATION of Allen Schwartz by plaintiff Frank Buono, plaintiff Allen Schwartz in suppt of plf's motion for summary judgment [16-1] (mrgo) (Entered: 03/14/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
3/13/02	21	DECLARATION of Peter J Eliasberg by plaintiff Frank Buono, plaintiff Allen Schwartz in suppt of plf's motion for summary judgment [16-1] (mrgo) (Entered: 03/14/2002)
3/13/02	22	NOTICE OF MOTION AND MOTION by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin for summary judgment; motion hearing set for 10:00 5/6/02 Lodged propsd ord & stmt (mrgo) (Entered: 03/14/2002)
3/13/02	23	MEMORANDUM IN SUPPORT by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin of dft's motion for summary judgment [22-1] (mrgo) (Entered: 03/14/2002)
3/13/02	24	DECLARATION of Mary Martin by defendant Gail Norton, defendant John J Reynolds, defendant Mary

DATE	DOCKET NUMBER	PROCEEDINGS
		Martin in suppt of dfts' motion for summary judgment [22-1] (mrgo) (Entered: 03/14/2002)
3/13/02	25	DECLARATION of Charles R Shockey by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin in suppt of dfts' motion for summary judgment [22-1] (mrgo) (Entered: 03/14/2002)
		* * * * *
3/13/02	54	STATEMENT OF UNCONTROVERTED FACTS by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin in suppt of dfts' motion for summary judgment [22-1] (mrgo) (Entered: 08/14/2002)
3/13/02	55	PROPOSED STMT OF UNCONTROVERTED FACTS filed by plaintiff Frank Buo-

DATE	DOCKET NUMBER	PROCEEDINGS
		no, plaintiff Allen Schwartz (mrgo) (Entered: 08/14/2002)
		* * * * *
4/10/02	33	OPPOSITION by plaintiff Frank Buono, plaintiff Allen Schwartz to dfts' motion for summary judgment [22-1] (mrgo) (Entered: 04/11/2002)
4/10/02	34	EVIDDENTIARY [*sic*] OBJECTIONS filed by plaintiff Frank Buono, plaintiff Allen Schwartz to dfts' motion for summary judgment [22-1] (mrgo) (Entered: 04/11/2002)
4/10/02	35	RESPONSE by plaintiff Frank Buono, plaintiff Allen Schwartz to dfts' stmt of uncontroverted facts in suppt of their motion for summary judgment [22-1] (mrgo) (Entered: 04/11/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/02	36	DECLARATION of Frank Buono by plaintiff Frank Buono, plaintiff Allen Schwartz re dfts' motion for summary judgment [22-1] (mrgo) (Entered: 04/11/2002)
4/10/02	37	MEMO IN RESPONSE by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin to plf's motion for summary judgment [16-1] (mrgo) (Entered: 04/11/2002)
4/10/02	38	STATEMENT OF GENUINE ISSUES by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin in resp to plf's motion for summary judgment [16-1] (mrgo) (Entered: 04/11/2002)
		* * * * *
4/17/02	40	REPLY MEMO by defendant Gail Norton, defendant John J Reynolds in suppt of dfts mot for sum-

DATE	DOCKET NUMBER	PROCEEDINGS
		jgm [16-1] (am) (Entered: 04/29/2002)
4/17/02	41	REPLY by plaintiff Frank Buono, plaintiff Allen Schwartz in suppt of their mot for sum jgm [22-1] (am) (Entered: 04/29/2002)
4/17/02	42	NOTICE of lodging depo transc (3 depos) by plaintiff Frank Buono, plaintiff Allen Schwartz (am) (Entered: 04/29/2002)
		* * * * *
4/25/02	44	NOTICE of lodging depos transc (4 depos) by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin (am) (Entered: 04/29/2002)
		* * * * *
7/24/02	48	ORDER by Judge Robert J. Timlin granting plf's motion for summary judgment [16-1], denying dfts Gale Norton, John Reynolds & Mary Martin's motion

DATE	DOCKET NUMBER	PROCEEDINGS
		for summary judgment [22-1] (mrgo) Modified on 07/25/2002 (Entered: 07/25/2002)
7/24/02	49	JUDGMENT: IT IS ORDERED & ADJUDGED that jgm be ent in Plfs' favor on their claim for declaratory & injunctive relief; IT IS FUR ORD ADJUDGED & DECLARED that the actions of Dfts violated Plfs' rights under the Establishment Clause of the 1st Amendment to the US Constitution; IT IS FUR ORD & ADJUDGED that Dfts and those in active concert w/ Dfts, are hereby permanently restrained & enjoined from permitting the display of the Latin cross in the area of sunrise Rock in the Mojave National Preserve; IT IS FUR ORD & ADJUDGED that Plfs have 60 days from the entry of this Jgm to file any mot for atty's fees by Judge Robert

DATE	DOCKET NUMBER	PROCEEDINGS
		J. Timlin (ENT 7/26/02) terminating case (MD JS-6) (ad) (Entered: 07/26/2002)
8/7/02	50	NOTICE OF MOTION AND MOTION by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin to alter, amend & stay jgm; motion hearing set for 10:00 9/23/02; Lodged propsd ord (mrgo) (Entered: 08/09/2002)
8/7/02	51	MEMORANDUM IN SUPPORT by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin of dfts' motion to alter, amend & stay jgm [50-1] (mrgo) (Entered: 08/09/2002)
		* * * * *
8/21/02	56	NOTICE OF MOTION AND MOTION by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin to alter, amend & stay jgm; motion hearing set

DATE	DOCKET NUMBER	PROCEEDINGS
		for 10:00 9/23/02 (mrgo) (Entered: 08/26/2002)
		* * * * *
9/9/02	58	OPPOSITION by plaintiff Frank Buono, plaintiff Allen Schwartz to dfts' motions to alter, amend & stay jgm [56-1], motion to alter, amend & stay jgm [50-1]; stmt of non-opp to mot for 69 day stay of jgm. (mrgo) (Entered: 09/11/2002)
9/16/02	59	REPLY by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin in suppt of their motion to alter, amend & stay jgm [56-1] (mrgo) (Entered: 09/18/2002)
		* * * * *
10/28/02	61	ORDER by Judge Robert J. Timlin 1) denying dfts' motion to alter, amend & stay jgm [56-1], 2) granting dfts' mot to stay jgm for 60 days. (ENT 10/29/02) (mrgo) (Entered: 10/29/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/20/02	70	ORDER by Judge Robert J. Timlin GRANTING Dfts' Motion to extend time to file ntc of appeal & cont stay of jgm [65-1]: IT IS HEREBY ORDERED THAT: Dfts' Mot to ext time to file a Ntc of Appeal be & hereby is GRANTED, and any ntc of appeal must be filed on or bef 1/27/03; Dfts' Mot to Cont the Stay of Jgm for 30 days be & hereby is GRANTED, and the force and effect of the Jgm ent on 10/29/02, is stayed until 1/7/03 (ad) (Entered: 12/31/2002)
		* * * * *
12/27/02	71	NOTICE OF APPEAL by defendant Gail Norton, defendant John J. Reynolds, defendant Mary Martin to 9th C/A from Dist. Court order filed 10/28/02, entered 10/29/02 [61-1]; judgment filed 07/24/02, entered

DATE	DOCKET NUMBER	PROCEEDINGS
		07/26/02 [49-2]; order filed 07/24/02 [48-1]. (cc: Charles R. Shockey, United States Department of Justice; Larry J. Bradfish, U.S. Department of the Interior; Peter D. [*sic*] Eliasberg) Fee: Waived (wdc) (Entered: 01/02/2003)
		* * * * *
1/24/03	80	ORDER by Judge Robert J. Timlin granting dfts' motion to continue stay of judgment for 30 additional days [76-1]; it is fur ord that the force & effect of the jgm ent on 10/29/02 is stayed until 2/26/03. (mrgo) (Entered: 01/27/2003)
		* * * * *
2/21/03	82	STIPULATION and ORDER by Judge Robert J. Timlin: that the stay of the Judgment is cont in effect until 3/10/03, in order to enable the Court to consider the Dfts' forthcoming motion

DATE	DOCKET NUMBER	PROCEEDINGS
		for stay pending appeal; IT IS SO ORDERED. (ad) (Entered: 02/21/2003)
2/27/03	85	NOTICE OF MOTION AND MOTION by defendant Gail Norton, defendant John J Reynolds, defendant Mary Martin to stay case pending appeal; motion hearing set for 10:00 3/24/03; Lodged Order (ad) (Entered: 03/03/2003)
2/27/03	86	MEMORANDUM IN SUPPORT by defendants of Motion to stay case pending appeal [85-1] (ad) (Entered: 03/03/2003)
		* * * * *
3/4/03	90	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION by plaintiffs Frank Buono, Allen Schwartz to Motion to stay case pending appeal [85-1]; Plaintiff's STATEMENT OF NON-OPPOSITION to Motion to shorten time to hear dfts' Motion for stay pending

DATE	DOCKET NUMBER	PROCEEDINGS
		appeal [87-1] (ad) (Entered: 03/06/2003)
3/4/03	91	DECLARATION of Frank Buono by plaintiffs in support of opposition to Motion to stay case pending appeal [85-1] (ad) (Entered: 03/06/2003)
		* * * * *
3/7/03	92	MINUTES. DENYING Defendants' Motion to stay case pending appeal [85-1] by Judge Robert J. Timlin; CR: None (ad) (Entered: 03/10/2003)
		* * * * *
3/13/03	93	NOTICE by defendants of Implementation of Judgment (ad) (Entered: 03/14/2003)
		* * * * *
6/5/03	103	ORDER FROM USCA On 5/19/03, court issued order granting appellants' motion to stay district court's

DATE	DOCKET NUMBER	PROCEEDINGS
		7/24/02 order permanently enjoining display of a cross erected on Sunrise Rock in Mojave National Preserve. To the extent that district court's order requires immediate removal or dismantling of cross, such removal or dismantling is stayed pending appeal. This appeal remains on the 8/4 - 8/6[/]03 calendar in Pasadena, California. (03-55032) (pjap) (Entered: 06/10/2003)
6/12/03	104	ORDER by Judge Robert J. Timlin: IT IS ORDERED THAT: 1) Plaintiffs' motion for attorney fees and costs under the EAJA [95-1] is GRANTED, and 2) Defendants shall pay $41,451.84 in attorneys' fees, as well as $2,686.56 in costs to Plaintiffs, upon termination of all appellate proceedings (ad) (Entered: 06/12/2003)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/03	107	NOTICE OF APPEAL by defendant Gail Norton, Secretary of the Interior, in her official capacity, John Jarvis, Regional Director, Pacific West Region, National Park Service, Department of Interior, in his official capacity, and Mary Martin, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior, in her official capacity to 9th C/A from Dist. Court order filed 6/12/03 [104-1] (cc: Thomas L. Sansonetti; Charles R. Shockey; Maria A. Ilzuka) Fee: Waived (dlu) (Entered: 08/14/2003)
	* * * * *	
8/2/04	113	MANDATE of 9th CCA filed as to Appeal to Circuit Court, 71 , CCA # 03-55032. The judgment of said district court is affirmed, with cost of $358.60. Mandate received in this district on

DATE	DOCKET NUMBER	PROCEEDINGS
		8/5/04. (weap,) (Entered: 08/06/2004)
9/21/04	114	MANDATE of 9th CCA filed as to Appeal to Circuit Court, 107 CCA # 03-56443. The appeal is dismissed. Mandate received in this district on 09/23/04. (cbr,) (Entered: 09/27/2004)
11/29/04	115	MOTION to Enforce, or in the alternative, modify permanent injunction filed by plaintiff Frank Buono. Motion set for hearing on 1/3/2005 at 10:00 AM before Honorable Robert J. Timlin. (mrgo,) (Entered: 12/06/2004)
		* * * * *
11/29/04	117	DECLARATION of Peter J Eliasberg, Frank Buono in support of plaintiff's MOTION to Enforce 115 filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		plaintiff Frank Buono. (mrgo,) (Entered: 12/06/2004)
		* * * * *
1/7/05	120	RESPONSE to plaintiff's MOTION to Enforce 115 filed by defendants Gail Norton, John J Reynolds, Mary Martin. (mrgo,) (Entered: 01/11/2005)
1/7/05	121	DECLARATION of Gregory F Gress in support of defendants' response to plaintiff's MOTION to Enforce 115 filed by defendants Gail Norton, John J Reynolds, Mary Martin. (mrgo,) (Entered: 01/11/2005)
		* * * * *
1/31/05	125	REPLY MEMORANDUM OF POINTS AND AUTHORITIES in support of plaintiffs' MOTION to Enforce 115 filed by plaintiff Frank Buono. (mrgo,) (Entered: 02/01/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
4/8/05	126	ORDER by Judge Robert J. Timlin: GRANTING 115 Motion to Enforce the Permanent injunction. Motion to amend the permanent injunction is DENIED as moot; Defendants Gale Norton, Jonathan Jarvis, and Mary Martin their agents employees, successors, assignees, or anyone acting in concert with them are permanently enjoined from implementing the provision of Section 8121 of Public Law 108-87; and Defendants Gale Norton, Jonathan Jarvis and Mary Martin are hereby ordered to comply with for[th]-with with the judgment and permanent injunction entered by this court on 7/24/02. (am,) (Entered: 04/11/2005)
		* * * * *
6/3/05	127	NOTICE OF APPEAL to 9th CCA filed by defendants Gail Norton, Jonathan

DATE	DOCKET NUMBER	PROCEEDINGS
		B. Jarvis, Mary Martin. Appeal of Order 126 Filed On: 04/08/05; Entered On: 04/11/05. Filing fee $255. Waived, cc: Charles R. Shockey; Peter J. Eliasberg. (cbr,) (Entered: 06/08/2005)
		* * * * *
6/5/08	136	Mandate of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 127, CCA # 05-55852. The Judgment of District Court is AFFIRMED. Mandate received in this district on 06/09/08. (cbr) (Entered: 06/11/2008)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55032

FRANK BUONO; ALLEN SCHWARTZ,
PLAINTIFFS-APPELLEES

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/8/03	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 1/15/03; appellant's designation of RT is due 1/6/03; appellee's designation of RT

DATE	DOCKET NUMBER	PROCEEDINGS
		is due 1/16/03; appellant shall order transcript by 1/27/03; court reporter shall file transcript in DC by 2/26/03; certificate of record shall be filed by 3/5/03; appellant's opening brief is due 4/14/03; appellees' brief is due 5/14/03; appellants' reply brief is due 5/28/03; [03-55032] (BG)
		* * * * *
3/12/03	8	Filed Appellants' motion for stay of injunction pending appeal or in the alternative to expedite briefing and argument [03-55032] served on 3/11/03 [4678902] (MOATT) [03-55032] (XX)
		* * * * *
3/20/03	10	Filed Appellees' response opposing appellant's motion for stay of injunction pending appeal or in the alternative to expedite briefing and argument, [4678902-1] served on 3/19/03 (MOATT) [03-55032] (XX)

DATE	DOCKET NUMBER	PROCEEDINGS
3/24/03	11	Filed Appellees' response to aplt's motion to expedite their motion for stay of injunction pending appeal, [4678902-1] served on 3/21/03 (MOATT) [03-55032] (XX)
3/25/03	14	Filed Appellants' reply to response in support of appellant's motion for stay of inj or in the alternative to expedite briefing and argument [4678902-1]; served on 3/24/03 (MOATT) [03-55032] (XX)
	* * * * *	
4/17/03	15	Filed original and 15 copies Appellants' opening brief (Informal: no) 25 pages and five excerpts of record in 1 volumes [*sic*]; served on 4/14/03 [03-55032] (XX)
5/15/03	16	Filed original and 15 copies appellees' 33 pages brief, 1 Exc. vols:; served on 5/14/03 [03-55032] (XX)

DATE	DOCKET NUMBER	PROCEEDINGS
5/19/03	19	Filed order (Harry PREGERSON, Susan P. GRABER): granting appellant's motion to stay the DC's 7/24/02 order. [4678902-1] Aplt's motion to expedite consideration of its stay motion is denied as moot. The briefing schedule established previously shall remain in effect. The clerk shall calendar this case during the week of 8/4-6/03 in Pasadena. [03-55032] (XX)
		* * * * *
5/23/03	22	CALENDARED: PASA Aug 6 2003 900 am Courtroom I ** session starts at 9:30 am **[03-55032] (AW)
6/3/03	24	Filed order (Harry PREGERSON, Susan P. GRABER): On 5/19/03, the court issued an order granting aplts' motion to stay the DC's 7/24/02 order permanently enjoining the display of a cross erected on Sunrise Rock in the Mojave National

DATE	DOCKET NUMBER	PROCEEDINGS
		Preserve. The court hereby sua sponte clarifies its May 19, 2003 order. To the extent that the DC's order requires the immediate removal or dismantling of the cross, such removal or dismantling is stayed pending appeal. This stay shall not apply, however, to any alternative methods for complying with, or additional obligations imposed by, the DC's 7/24/02 order. This appeal remains on the 8/4-6/03 calendar in Pasadena. [03-55032] (XX)
6/6/03	26	Filed original and 15 copies reply brief, (Informal: no) 13 pages; served on 6/2/03 (PANEL) [03-55032] (XX)
7/9/03	30	Filed appellants' additional citations, served on 7/8/03 (PANEL by fed ex) [03-55032] (RT)

DATE	DOCKET NUMBER	PROCEEDINGS
7/16/03	34	Filed Appellees' Frank Buono, Allen Schwartz additional citations, served on 7/14/03 (PANEL by fed ex) [03-55032] (RT)
8/6/03	36	ARGUED AND SUBMITTED TO Alex KOZINSKI, Thomas G. NELSON, Jane A. Restani [03-55032] (BG)
11/20/03	38	Filed aples' additional citations, served on 11/19/03 (PANEL) [03-55032] (XX)
11/28/03	40	Filed order (Alex KOZINSKI, Thomas G. NELSON, Restani) No later than 14 days from the date of this order, aplts shall file supplemental briefing on the impact, if nay [*sic*], of section 8121 of the Department of Defense Appropriations Act, 2004. Pub. L. No. 108-87, 117 Stat.

DATE	DOCKET NUMBER	PROCEEDINGS
		1054 (2003). Aples shall file an answer 14 days thereafter. The briefs shall not exceed 15 pages. (faxed) [03-55032] (GV)
12/12/03	41	Filed original and 15 copies Appellants' supplemental brief of 5 pages, served on 12/11/03 (PANEL) [03-55032] (XX)
	* * * * *	
12/31/03	48	Filed original and 15 copies Appellees' supplemental brief of 15 pages & 5 supp exc, served on 12/30/03 (PANEL) [03-55032] (XX)
	* * * * *	
1/22/04	55	Filed Appellants' supplemental reply memorandum of 4 pages, served on 1/8/04 (panel previously) [03-55032] (XX)
5/7/04	56	Filed aplts' additional citations, served on 5/4/04 (PANEL by fax) [03-55032] (XX)

DATE	DOCKET NUMBER	PROCEEDINGS
6/1/04	59	Received notice of death of aple Allen Schwartz from Peter Eliasberg atty for aple. (PANEL by fax) (XX)
6/7/04	60	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Alex KOZINSKI, author; Thomas G. NELSON; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [03-55032] (XX)
6/7/04	61	Filed Frank Buono's additional citations, served on 6/4/04 (PANEL) [03-55032] (XX)
		* * * * *
8/2/04	64	MANDATE ISSUED costs taxed against aplts for $358.60 [03-55032] (CW)
9/21/04	65	Order filed: Pursuant to stipulation of the parties, the Untied States shall pay to plaintiffs-appellees the sum of $62,793.69 as pymt in full

DATE	DOCKET NUMBER	PROCEEDINGS
		of all attys fees and costs incurred in Central District of California civil action number 01-216-RT (SGLx) and 9th Circuit appeal numbers 03-55032 and 03-56443. Pursuant to stipulation of the parties, appeal no. 03-56443 is voluntarily dismissed. A certified copy of this order shall serve as the mandate in 03-56443. (Procedurally Terminated After Other Judicial Action; F.R.A.P. 42. Alex KOZINSKI, Thomas G. Nelson, Jane A. Restani) [03-56443] (SW)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO, PLAINTIFF-APPELLEE

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JONATHAN B. JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT, MOJAVE NATIONAL PRESERVE, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HER OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/15/05	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 6/22/05; appellant's desig-

DATE	DOCKET NUMBER	PROCEEDINGS
		nation of RT is due 6/13/05; appellee's designation of RT is due 6/23/05; appellant shall order transcript by 7/5/05; court reporter shall file transcript in DC by 8/3/05; appellant's opening brief is due 9/19/05; appellees' brief is due 10/19/05; appellants' reply brief is due 11/2/05; [05-55852] (BG)
		* * * * *
11/3/05	11	Filed original and 15 copies Appellant Gail Norton, Appellant Jonathan B. Jarvis, Appellant Mary Martin opening brief (Informal: no) 41 pages and five excerpts of record in 1 volumes [*sic*]; served on 11/2/05 [05-55852] (SW)
11/18/05	13	Filed original and 15 copies The National Legal's brief of 12 pages; served on 11/14/05 [05-55852] (SW)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/23/06	17	Filed original and 15 copies appellee Frank Buono's 48 pages brief, I Exc. vols:; served on 2/22/06 [05-55852] (SW)
		* * * * *
5/15/06	27	Filed original and 15 copies appellants Gail Norton, Jonathan B. Jarvis, Mary Martin reply brief, (Informal: No) 26 pages; served on 5/11/06 [05-55852] (RT)
		* * * * *
12/19/06	29	Filed fed aples additional citations, served on 12/8/06 RECORDS FOR MERITS PANEL [05-55852] (GR)
12/28/06	30	Received Peter J. Eliasberg for Appellee Frank Buono letter dated 12/26/06 re: response to addl citations. RECORDS FOR MERITS PANEL [05-55852] (GR)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/16/07	33	CALENDARED: PASA Apr 9 2007 9:00 am Courtroom 2 [05-55852] (XX)
		* * * * *
4/9/07	37	ARGUED AND SUBMITTED TO Betty B. FLETCHER, M. M. McKEOWN, Ronald M. Whyte [05-55852] (C)
9/6/07	42	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Betty B. FLETCHER; M. M. McKEOWN, author; Ronald M. Whyte.) FILED AND ENTERED JUDGMENT. [05-55852] (SW)
		* * * * *
11/21/07	47	Filed original and 50 copies Appellants Gail Norton, Jonathan B. Jarvis, Mary Martin petition for panel rehearing and petition for rehearing en bane 18 p.pages [*sic*], served on 11/20/07 PANEL/AC-

DATE	DOCKET NUMBER	PROCEEDINGS
		TIVE JUDGES/INTERESTED SENIOR JUDGES [05-55852] (LA)
11/30/07	50	Filed order (Betty B. FLETCHER, M. M. McKEOWN, Ronald M. Whyte): The aple Frank Buono shall file a response to the petition for rehearing and rehearing en banc not exceeding fifteen (15) pages in length setting forth his position on whether this case should be reheard en banc. Fifty (50) copies of the brief shall be filed within twnety-one (21) days from the date this order is filed. [05-55852] (SW)
		* * * * *
1/18/08	56	Filed Appellee Frank Buono's response to petition for enbanc rehearing served on 1/17/08 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [05-55852] (SW)

DATE	DOCKET NUMBER	PROCEEDINGS
5/14/08	57	Filed order and amended opinion (BETTY BINNS FLETCHER, M. MARGARET MCKEOWN and RONALD M. WHYTE). Amending Opinion AFFIRMED; The opinion filed September 6, 2007, slip op. 11793, and appearing at 502 F.3d 1069, is amended as follows: (See order for full text). With this amendment, the panel has voted to deny Defendants-Appellants petition for panel rehearing. Judge McKeown votes to deny the petition for rehearing en banc and Judges B. Fletcher and Whyte so recommend. The full court has been advised of Defendant-Appellant's petition for rehearing en banc, and a judge of this court requested a vote on whether this case should be reheard en banc; however, a majority of the active judges did not vote in

DATE	DOCKET NUMBER	PROCEEDINGS
		favor of en banc consideration. Fed. R. App. P. 35. Judge Reinhardt was recused from considering the en banc issues in this case and did not participate in the court's decision. The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be entertained. (RP)
		* * * * *
6/5/08	59	ENTRY UPDATED. MANDATE ISSUED. (BBF, MMM and RMW)—[Edited 06/05/2008 by GV] MANDATE ISSUED.() Cost awarded to APPELLEE $343.40. (GV)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA-EASTERN DIVISION

No. ED CV 01-216-RT

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC NORTHWEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

[Filed: July 24, 2002]

JUDGMENT

On July 24, 2002, the Court made an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Order"). Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be entered in Plaintiffs' favor on their claim for declaratory and injunctive relief.

IT IS FURTHER ORDERED ADJUDGED AND DECLARED that the actions of Defendants, as stated

in the uncontroverted material facts section of the Order, violated Plaintiffs' rights under the Establishment Clause of the First Amendment to the Untied States Constitution.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs recover their costs against Defendants in the amount of $ _____.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs have sixty days from the entry of this Judgment to file any motion for attorney's fees.

DATED: July 24, 2002

/s/ ROBERT J. TIMLIN
ROBERT J. TIMLIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55032
D.C. No. CV-01-00216-RT
Central California (Riverside)

FRANK BUONO, ET AL., PLAINTIFFS-APPELLEES

v.

GAIL NORTON, SECRETARY OF THE INTERIOR,
IN HER OFFICIAL CAPACITY; ET AL.,
DEFENDANTS-APPELLANTS

[Filed: May 19, 2003]

ORDER

Before: PREGERSON and GRABER, Circuit Judges

Appellant's motion to stay the district court's July 24, 2002 order is granted.

Appellant's motion to expedite consideration of its stay motion is denied as moot.

The briefing schedule established previously shall remain in effect.

The Clerk shall calendar this case during the week of August 4-6, 2003, in Pasadena California.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55032
D.C. No. CV-01-00216-RT
Central California (Riverside)

FRANK BUONO, ET AL., PLAINTIFFS-APPELLEES

v.

GAIL NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; ET AL., DEFENDANTS-APPELLANTS

[Filed: June 3, 2003]

ORDER

Before: PREGERSON and GRABER, Circuit Judges

On May 19, 2003, the court issued an order granting appellants' motion to stay the district court's July 24, 2002 order permanently enjoining the display of a cross erected on Sunrise Rock in the Mojave National Preserve. The court hereby sua sponte clarified its May 19, 2003 order.

To the extent that the district court's order requires the immediate removal or dismantling of the cross, such removal or dismantling is stayed pending appeal. This stay shall not apply, however, to any alternative meth-

ods for complying with, or additional obligations imposed by, the district court's July 24, 2002 order.

This appeal remains on the August 4-6, 2003 calendar in Pasadena, California.

Pub. L. 106-554, 114 Stat. 2763, 2763A-230, § 133 (2000)

SEC. 133. None of the funds in this or any other Act may be used by the Secretary of the Interior to remove the five-foot-tall white cross located within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15.

Pub. L. 107-117, 115 Stat. 2230, 2278-79, § 8137 (2002)

SEC. 8137. (a) DESIGNATION OF NATIONAL MEMORIAL.—The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

(b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of theproperty to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.

(c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Pub. L. 107-248, 116 Stat. 1519, 1551, § 8065 (2002)

SEC. 8065. (a) None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of the Department of Defense who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act without the express authorization of Congress: Provided, That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.

(b) None of the funds in this or any other Act may be used to dismantle national memorials commemorating United States participation in World War I.

Pub. L. No. 108-87, 117 Stat. 1054, 1100 (2004):

(a) EXCHANGE REQUIRED.—In exchange for the private property described in subsection (b), the Secretary of the Interior shall convey to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107-117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war. Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569-051-44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

(c) EQUAL VALUE EXCHANGE; APPRAISAL.—The values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d). The value of the properties shall be determined through an appraisal performed by a qualified appraiser in conformance with the Uniform Appraisal Standards

for Federal Land Acquisitions (Department of Justice, December 2000).

(d) CASH EQUALIZATION.—Any difference in the value of the properties to be exchanged under this section shall be equalized through the making of a cash equalization payment. The Secretary shall deposit any cash equalization payment received by the Secretary under this subsection in the Land and Water Conservation Fund.

(e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

(f) BOUNDARY ADJUSTMENT; ADMINISTRATION OF ACQUIRED LAND.—The boundaries of the Mojave National Preserve shall be adjusted to reflect the land exchange required by this section. The property acquired by the Secretary under this section shall become part of the Mojave National Preserve and be administered in accordance with the laws, rules, and regulations generally applicable to the Mojave National Preserve.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-EDCV 01-216 RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC NORTHWEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

[Oct. 23, 2001]

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

[ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION]

I.

JURISDICTION AND VENUE

1. Plaintiffs seek declaratory and injunctive relief to require officials of the Department of Interior and

one of its divisions, the National Park Service, to remove a free standing Latin Cross from federally-owned land in the Mojave National Preserve. This Court has jurisdiction over Plaintiffs' claim pursuant to 28 U.S.C. §§ 1331 and 1343(3), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek to redress the violation by Defendants, acting under color of state law, of Plaintiffs' rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution.

2. Venue lies in the Central District of California under 28 U.S.C. § 1391(e), because a substantial portion of the events and omissions giving rise to Plaintiffs' claims occurred in the Central District of California, and because all Defendants reside in the Central District of California.

II.

INTRODUCTION

3. This action seeks to put an end to the display of a Latin Cross, a sectarian religious symbol on federally-owned land in violation of the Establishment Clause of the First Amendment to the United States Constitution. The Plaintiffs bring this action against the Defendants seeking an order from this Court enjoining Defendants from continuing to allow the display of this sectarian symbol on government-owned land.

III.

PARTIES

4. Plaintiff Frank Buono is a former employee of the National Parks Service ("NPS"), a division of the Department of the Interior ("DOI"). Mr. Buono worked

for the NPS from 1972 to 1997. Mr. Buono was assigned to the Mojave area from November 1994 until December 1995 as the assistant superintendent. He was the assistant superintendent of the Joshua Tree National Park at his retirement.

5. Mr. Buono regularly visits the Mojave National Preserve and drives on both its paved and its dirt roads in order to enjoy its emptiness and beauty. On these trips, Mr. Buono has come in contact with a freestanding Latin Cross, which sits on federally-owned land known as Sunrise Rock approximately 11 miles south of Interstate 15. (See photos attached as Exhibits A and B.) Although Mr. Buono has no objection to Christian symbols on private property, he is deeply offended by the display of a Latin Cross on government-owned property—property that is not open to groups and individuals to erect other freestanding, permanent displays. The presence of the Cross along with the exclusion of other freestanding, permanent displays adversely affects Mr. Buono's use and enjoyment of the area. Mr. Buono has been deprived of rights, privileges and immunities secured by the United States Constitution.

6. Plaintiff Allen Schwartz is a Jewish veteran of the United States Armed Forces. He joined the Air National Guard in 1953 and was on active duty in the Air Force from 1956 until September 30, 1978. During his years of active duty Mr. Schwartz served in a variety of places in the United States, including March Air Force Base in California, as well as in Korea in 1958 and in Vietnam from January 1967 through January 1968. Mr. Schwartz was a Master Sergeant when he retired from active duty.

7. During his time in the service, Mr. Schwartz was awarded the following medals or commendations: the Air Force Good Conduct Medal; the Army Good Conduct Medal; the Air Commendation Medal twice; the Vietnam Service Medal; the Presidential Unit Citation; and the Air Force Outstanding Unit Citation.

8. Mr. Schwartz is currently a member of a wide variety of veterans organizations. He is the Quartermaster of Post 512 of the Jewish War Veterans, Commander of Post 6476 of the Veterans of Foreign Wars, and Chaplain of American Legion Post 155. He is also a member of the Disabled American Veterans, the Retired Enlisted Association; the Air Force Sergeants Association, and the American Veterans Association.

9. Mr. Schwartz lives in Rialto in San Bernardino County. He travels to Las Vegas five to ten times a year, thereby passing close to where the Latin Cross is located. Mr. Schwartz has seen this Cross and climbed up to where it is located. He is offended by the Cross' presence on federal land because he does not believe that the United States should permit sectarian religious symbols on government land unless all citizens are free to post whatever signs or symbols they wish in the same area. The presence of the Cross to the exclusion of all other symbols strikes him as governmental favoritism of one religion that he does not share, thereby making him feel like an outsider.

10. At the time Mr. Schwartz climbed up to the Cross, there were no plaques or other signs stating that the Cross is intended to be a veterans memorial. Even if such signs were there, the Cross would offend Mr. Schwartz, because a sectarian Christian symbol is not meaningful to him as a Jewish war veteran. The pres-

ence of the Cross negatively affects Mr. Schwartz's enjoyment of the area as he passes through it.

11. Defendant Gale Norton is the Secretary of the United States Department of the Interior ("DOI"). As Secretary of the DOI, she oversees the NPS. The Mojave National Preserve ("MNP"), where the Latin Cross is located, is managed by the NPS. Secretary Norton is sued in her official capacity.

12. Defendant John J. Reynolds is the Regional Director, Pacific West Region, of the NPS. The MNP is within the Pacific West Region. He is sued in his official capacity.

13. Defendant Mary Martin is the Superintendent of the MNP. She is sued in her official capacity.

14. Plaintiffs are informed and believe, and upon that basis allege, that at all times mentioned herein each Defendant was and is the agent of each other Defendant and, in doing or failing to do the things complained of, was acting within the scope of said authority.

15. At all relevant times, Defendants acted under the color of their authority as officials of the United States Department of Interior, and under color of the statutes, regulations, customs and usages of the United States, and each of the Defendants acted as the agent of the other Defendants.

IV.

FACTS

A. Creation of the Mojave National Preserve

16. The MNP is an area of primarily federal land located in California and run by the NPS. It was trans-

ferred to the control of the NPS from the Bureau of Land Management ("BLM") in October, 1994 as result of the California Desert Protection Act.

B. Presence of the Cross

17. A Latin Cross sits on federally-owned land known as Sunrise Rock in an area of the preserve approximately 11 miles south of Interstate 15 on the Cima Road. (See map attached as Exhibit C.) The Latin cross is the preeminent symbol of Christianity.

18. There are no other freestanding displays, religious or otherwise in the area.

19. Larry Bradfish, Assistant Solicitor for the DOI, has stated that no other freestanding, permanent displays are permitted in the area. He also stated that if someone were to erect another freestanding display in the area, employees of the NPS would remove it.

20. The NPS has not opened up the area of Sunrise Rock to individuals to erect freestanding, permanent displays, just as the Grand Canyon, Yellowstone Park, or any other National Park are closed to groups who wish to erect freestanding, permanent political billboards or advertisements.

21. Nothing on or around the Cross disassociates the federal government from the Cross.

22. Nothing on or around the Cross explains the display or its history, although it was purportedly erected by the Veterans of Foreign Wars.

C. Mr. Buono's Involvement With the Preserve

23. Mr. Buono was actively involved in the designation of the Mojave Preserve area as a national park system area and its transfer from the control of the BLM to the NPS.

24. In 1986, Senator Alan Cranston proposed legislation, which would later become the California Desert Protection Act. In subsequent years, Mr. Buono regularly consulted with employees at the NPS legislative affairs office in the effort to have the legislation enacted into law. Mr. Buono wrote position papers on a variety of issues in support of the legislation.

25. In 1992, while Mr. Buono was working as an instructor at the NPS training center, he sponsored a panel discussion about the Desert Protection legislation.

26. In or about 1992, because of the pending legislation, Mr. Buono took a class of NPS employees to visit the Mojave area.

27. Mr. Buono's substantial efforts in support of creating the Mojave National Preserve were recognized when he was invited to a reception at the office of then-Secretary of the Interior Babbitt's office after the signing of the California Desert Protection Act in 1994.

28. Mr. Buono has remained actively involved in the MNP since he transferred from there and since his retirement from the NPS.

29. While he was assistant superintendent at MNP, he worked out an arrangement with seven mining operations in the preserve so that they would have six months to adjust their operations to satisfy the NPS rules concerning mining. Those rules are stricter than the BLM

rules that applied to the mining operations before the MNP was transferred to the control of the NPS.

30. After he left MNP, Mr. Buono remained concerned that one mine had not come into compliance with the NPS rules. He worked with the National Parks and Conservation Association ("NPCA") in their effort to send letters to persuade government officials to alter the mining activities in the MNP.

31. When this letter writing campaign was unsuccessful, Mr. Buono worked with NPCA to find a public interest law firm to pursue litigation to shut down the mining operation.

32. As a result of the threat of this litigation, Mr. Buono and NPCA forced the government to terminate the mining operation in the MNP in August 1999.

33. Because of his continuing concern with the MNP, Mr. Buono maintains regular contact with a wide variety of persons and groups located in or involved with the MNP including the Sierra Club, Citizens for the Mojave National Park, NPCA, Center for Biological Diversity, Desert Tortoise Council Wilderness Society, Natural Resources Defense Council, the Soda Springs Desert Study Center, which is affiliated with Cal State University, and the Granite Mountain Natural Reserve, which is affiliated with University of California National Reserve.

34. Because of his history with the MNP, and his continuing and regular visits to the MNP, the MNP has special significance to Mr. Buono. Mr. Buono intends to continue to visit the MNP on a regular basis.

D. Events Leading Up to This Litigation

35. On October 6, 1999 Michael Small, then Chief Counsel of the ACLU of Southern California, wrote a letter to John Reynolds and Mary Martin, the Superintendent of the MNP stating that the display of the Latin Cross on federal land violates the Establishment Clause because it endorses both religion generally and a particular religious faith. The letter asked that the Cross be removed.

36. On January 18, 2000, after having received no response from anyone in the Department of the Interior concerning his October 6, 1999 letter, Mr. Small spoke by telephone with Larry Bradfish, Assistant Solicitor for the DOI. Mr. Bradfish stated that the Department was looking into the issues raised by Mr. Small's letter and stated that he would be sending a letter to Mr. Small shortly.

37. On January 21, 2000 Mr. Bradfish sent a letter to Mr. Small. The letter stated that the NPS had no role in erecting or maintaining the Cross and that the area around the Cross had become the site for "sunrise Easter services/community picnics and a meeting place for at least one local group of ranchers." It also stated that the NPS was "currently evaluating the historical significance, if any, of the cross." The letter did not respond to any of the constitutional issues raised in Mr. Small's letter nor did Mr. Bradfish give any indication that the DOI or NPS was intending to take down the Latin Cross.

38. After receiving Mr. Bradfish's letter and consulting with the Mr. Buono, Mr. Small and Mr. Buono decided to send another letter concerning the Cross. On

August 3, 2000 Mr. Small sent a letter to Robert Stanton, Director of the NPS. He also sent a copy to Ms. Molly Ross, the Assistant Solicitor for Parks and Recreation. In response to Mr. Bradfish's discussion of the various meetings that took place in the area around the Cross, the letter stated "[w]e want to make clear that we are not opposed to private individuals conduction religious exercises at [Mojave National Preserve]. The problem lies with the permanent, unattended cross. . . . " The letter concluded by stating that if the Cross were not removed or other steps not taken to address the constitutional violation, "we will have no choice but to file a lawsuit."

39. In early October 2000, Mr. Buono traveled to the MNP and observed that the NPS had not taken down the Latin Cross.

40. On October 20, 2000, Mr. Small received a letter from John J. Reynolds, the Regional Director of the NPS Pacific West Region. That letter stated that although there was substantial local opposition, the "Superintendent of Mojave National Preserve has decided to remove the cross in the next few months."

41. Sometime in late November, 2000 Mr. Buono spoke with an employee of the NPS who worked at the MNP to ask him if the NPS had removed the Cross. The employee informed Mr. Buono that the staff had been prepared to do so, but that Defendant, Mary Martin, had instructed the staff not to do so. Mr. McGuiness further informed Mr. Buono that Ms. Martin's instructions not to take the Cross down resulted from conversations she had with Congressman Jerry Lewis or members of his staff.

42. On December 4, 2000 Peter Eliasberg, another attorney at the ACLU, wrote to Mr. Reynolds to inquire as to why the Cross had not yet been taken down despite Mr. Reynolds' previous statement that NPS would take down the Cross. The letter also made clear that if Mr. Reynolds did not respond and inform Mr. Eliasberg by January 5, 2001 of a date certain by which the Cross would be taken down, a lawsuit would be filed.

43. On or about December 15, 2000 Congress passed HR 4577. Section 133 of that Act states:

> None of the funds in this or any other Act may be used by the Secretary of the Interior to remove the five-foot-tall white cross located within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15.

44. On or about December 21, 2000 President Clinton signed HR 4577, also known as Public Law 106-554.

45. Neither Mr. Reynolds, nor any other official at the NPS or DOI has ever responded to the request made in Mr. Eliasberg's letter of December 4, 2000.

46. The Cross is still standing on federally-owned land in the MNP.

V.

CAUSE OF ACTION

Establishment Clause of the First Amendment

47. Plaintiffs reallege and incorporate, as though fully set forth herein, each and every allegation contained in the above paragraphs.

48. No secular purpose is served by the placement of a cross on federally-owned land in the Mojave National Preserve.

49. The placement of the Cross on federally-owned land has the purpose and effect of promoting religion and constitutes an endorsement of religion as well as one particular religious faith to the exclusion of others.

50. Plaintiffs are entitled to relief because Defendants, acting under color of state law, have violated and continue to violate Plaintiffs' rights protected by the Establishment Clause and the Fourteenth Amendment.

VI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Declaratory judgment that the placement of a Latin Cross on federally-owned land in the Mojave National Preserve violates the Establishment Clause of the First Amendment of the United States Constitution, applicable to Defendants under the Fourteenth Amendment;

2. Enjoin Defendants to remove the Cross;

3. Grant Plaintiffs their costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 1920, 42 U.S.C. § 1988, and relevant decisional law; and,

4. Grant such other relief as this Court deems just and proper.

Dated: October 23, 2001

Respectfully Submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By: /s/ PETER J. ELIASBERG
PETER J. ELIASBERG
Mark D. Rosenbaum
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-EDCV 01-216-RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

Hearing Date: May 6, 2002
10:00 AM

DECLARATION OF FRANK BUONO

I, Frank Buono, hereby declare:

1. I am a plaintiff in the above-captioned action. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. I am a former employee of the National Parks Service ("NPS"), which is a division of the Department of the interior ("DOI"). I worked for the NPS from 1972 to 1997. I was assigned to the Mojave area from Novem-

ber 1994 until December 1995 as the assistant superintendent of the Mojave National Preserve (the "Preserve"). I was the assistant superintendent of the Joshua Tree National Park at my retirement.

3. I was actively involved in the designation of the Preserve area as a national park system area and its transfer to the NPS from the control of the Bureau of Land Management, another federal agency.

4. In 1986, Senator Alan Cranston proposed legislation, which would later become the California Desert Protection Act. In subsequent years, I regularly consulted with employees at the NPS legislative affairs office in the effort to have the legislation enacted into law. On a number of occasions, I wrote position papers, at the request of the NPS legislative affairs office, on a variety of issues in support of the legislation.

5. In 1992, while I was working as an instructor at the NPS training center, I sponsored a panel discussion about the Desert Protection legislation.

6. In or about 1992, because of the pending legislation, I took a class comprised of NPS employees to visit the Mojave area.

7. My efforts in support of creating the Preserve were recognized when I was invited to a reception at the office of then-Secretary of the Interior Babbitt's office after the signing of the California Desert Protection Act in 1994.

8. As a result of that Act, the land that is now the Mojave National Preserve was transferred from the control of the Bureau of Land Management, a federal agency, to the control of the National Park Service.

9. I have remained actively involved in the Preserve since I transferred from there and since I retired from the NPS.

10. While I was assistant superintendent at Preserve, I worked out an arrangement with seven mining operations in the preserve so that they would have six months to adjust their operations to satisfy the NPS rules concerning mining. Those rules are stricter than the BLM rules that applied to the mining operations before the Preserve was transferred to the control of the NPS.

11. After I left Preserve, I remained concerned that one mine had not come into compliance with the NPS rules. I worked with the National Parks and Conservation Association ("NPCA") in their effort to send letters to persuade government officials to alter the mining activities in the Preserve.

12. When this letter writing campaign was unsuccessful, I worked with NPCA to find a public interest law firm to pursue litigation to shut down the mining operation.

13. After the NPCA filed a notice of intent to sue letter, the government terminated the mining operation in the Preserve in August 1999.

14. I maintain regular contact with a wide variety of persons and groups located in or involved with the Preserve including the Sierra Club, Citizens for the Mojave National Park, NPCA, Center for Biological Diversity, Desert Tortoise Council Wilderness Society, Natural Resources Defense Council, the Soda Springs Desert Study Center, which is affiliated with Cal State University, and the Granite Mountain Natural Reserve, which

is affiliated with University of California National Reserve, because of my continuing concern with the Preserve.

15. I regularly visit the Mojave National Preserve to drive on both its paved and its dirt roads in order to enjoy its emptiness and beauty. Since leaving the NPS, I have visited the Mojave Preserve two to four times a year on average. I intend to continue to visit the Preserve on a regular basis.

16. I currently live in Prineville, Oregon, but intend to move to either Southern California or Arizona within the next few months. Once I have moved, I intend to visit the Preserve even more often.

17. Because of my history with the Preserve, and my continuing and regular visits, the Preserve has special significance to me.

18. On my trips to the Preserve, I have come in contact with a freestanding cross, which sits on federally-owned land in California, known as Sunrise Rock approximately 10 miles south of Interstate 15. The cross is visible as you travel on Cima Road, which is one of the main roads into and through the Preserve.

19. That cross has a vertical arm that appears to be longer than the horizontal arm, and the horizontal arm is closer to the top of the cross than the bottom.

20. I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property. However, I do strongly object to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs. The presence of the cross on federally owned land in the Pre-

serve deeply offends me and impairs my enjoyment of the Preserve.

21. In my trips to the Preserve, I have tended to and will continue to go out of my way to avoid seeing the cross, even though Cima Road is often the most convenient means of access to the Preserve, depending on where I am coming from. I have not, however, entirely avoided seeing the cross because I have wanted to see whether it was still there. Put differently, I have gone to the area in the hope it had been taken down. Now that the budget rider has passed, I do not expect the cross to come down unless this litigation succeeds. As a result, I will try to avoid seeing the cross in my future trips to the preserve, even though it may mean going out of my way to do so.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 13th day of March, 2002 in Prineville, Oregon.

/s/ FRANK BUONO
FRANK BUONO

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
EASTERN DIVISION

Case No. EDCV 01-216-RT
(SGLx)

FRANK BUONO, ET AL., PLAINTIFFS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR
IN HER OFFICIAL CAPACITY; ET AL., DEFENDANTS

Date: May 6, 2002

DECLARATION OF MARY MARTIN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, MARY MARTIN declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a defendant in this action and submit this declaration in support of the Defendants' Motion for Summary Judgment. I have personal knowledge of the facts stated herein. I am over 21 years of age, of sound mind, and competent to testify in this matter. If called upon to testify, I would testify that the facts set forth in this Declaration are true and correct.

2. I have been an employee of the National Park Service (NPS) in the U.S. Department of the Interior for the past 22 years, since 1980, and currently serve as Superintendent of the Mojave National Preserve (Preserve). The Preserve is located in San Bernardino, California, with headquarters in Barstow, California.

3. I received a Bachelor of Science degree from California State University, Bakersfield, with a major in Environmental Resource Management. I also completed one year of graduate study toward a Masters Degree in Public Administration at Golden Gate University in San Francisco, California.

4. From 1980 through 1995, I served in a variety of positions for NPS, including assignments in Yosemite National Park in California, the Alaska Regional Office in Anchorage, Alaska, and NPS headquarters in Washington, D.C., before my current assignment at the Preserve.

5. I first came to Mojave National Preserve on January 10, 1995, to serve as Deputy Superintendent. In December 1995, Marv Jensen, Superintendent of Mojave National Preserve, left Mojave National Preserve for another position elsewhere. I became Acting Superintendent upon his departure, and, in April 1996, I was officially appointed as Superintendent of Mojave National Preserve, a position which I continue to hold at present.

6. Mojave National Preserve was created in 1994 by Congress under the California Desert Protection Act. Because of its national preserve status

and because of provisions in the California Desert protection Act, Mojave National Preserve is subject to a variety of private uses and activities, including hunting, trapping, mining, and grazing.

7. Mojave National Preserve is located between Barstow, California, and Las Vegas, Nevada. The Preserve encompasses approximately 1.6 million acres of land containing both desert and mountains. Of that total, approximately 170,000 acres of land within the boundaries Mojave National Preserve were in non-federal hands at the time the Preserve was created in 1994. Today, privately owned land comprises approximately 86,600 acres within the boundaries of the Preserve, along with another roughly 43,000 acres owned by the State of California.

8. A cross made of iron pipe, approximately five to eight feet high, is located on a rock outcrop known as Sunrise Rock along Cima Road within Mojave National Preserve. The location is approximately 11 miles south of Interstate 15 and cannot be seen from the Interstate highway. The cross is visible from an auto traveling on Cima Road, a blacktop secondary road that passes through the Preserve, when the auto approaches to within approximately 100 yards of the location of the cross. The cross is located on a rock outcrop less than 100 feet east of Cima Road. There are two private ranches with corrals and related facilities within two miles of the cross.

9. I have known plaintiff Frank Buono since approximately 1994. Frank Buono, a former employee of the NPS, worked with me at Mojave National Preserve from January 22, 1995, to December 10, 1995, where he held the position of Assistant Superintendent for Ecosystem Management. He left Mojave National Preserve for a position at Joshua Tree National Park in December 1995. To the best of my recollection, at no time did Frank Buono ever discuss with or complain to me or anyone else about the presence of the cross on NPS land within the Preserve. In addition, Mojave National Preserve has no record of any written or oral complaint by Frank Buono concerning the cross until the NPS was served with the summons and complaint in this litigation in March 2001.

10. The NPS intended to remove the cross from public land following a written inquiry in 1999 by another individual about placing other religious symbols near the cross. The agency did not do so immediately, however, because of the need to place personnel in other parts of the Preserve on other more pressing matters. Following the threatened filing of a lawsuit by the American Civil Liberties Union (ACLU) in 2000, in combination with increased local and national publicity about the cross, the NPS intent to remove the cross became more complicated by increased public support for the cross.

11. In Spring 2000, the Preserve experienced considerable public opposition to the removal of Pacific Bell Company telephone booth, from within

the Preserve. The telephone, booth, located along a minor road within the Preserve, years ago had served as means for local area miners and ranchers to make telephone calls in this remote region. However, by 2000, the telephone booth had received considerable publicity through worldwide communications on the Internet and by national newscasts. As a result, members of the public came to the Preserve and visited the site of the telephone booth in increasing numbers, causing destruction and damage to resources in the Preserve. To protect these resources, the NPS requested that Pacific Bell remove the telephone booth. Following removal of the telephone booth in May 2000, I personally received at least one death threat and variety of email messages containing abusive, threatening, and derogatory language. I became concerned about the safety of my staff in carrying out their duties in the Preserve and in our offices in Barstow and Baker, California.

12. Because of the mounting public opposition to removal of the cross and my recent experience concerning removal of the telephone booth, I decided that it was not in the best interests of the Preserve to remove the cross immediately.

13. In August 2000, I received a copy of a letter from the ACLU to NPS Director Robert Stanton, dated August 3, 2000, in which the ACLU threatened to sue the NPS and seek damages against individual NPS employees.

14. On October 6, 2000, I issued a memorandum to my staff at the Preserve informing them of my

decision to remove the cross. My decision to remove the cross was based in part on my concern over having to personally incur considerable expense to defend my actions in any lawsuit brought by the ACLU that included a claim for damages against me. I remained concerned about the negative reaction that I expected from the public, however, and did not remove the cross. In the meantime Congress enacted legislation near of the end of 2000, as part of the Department of the Interior Appropriations Act for fiscal year 2001, which prohibited the Secretary of the Interior and NPS from spending any funds to remove the cross.

15. The cross predates creation of Mojave National Preserve in 1994 and has been erected and maintained on federal land exclusively by private individuals, without any form of NPS permission or authorization. The NPS has never taking any action to erect, maintain, or promote the presence of [*sic*] cross in any way. NPS does not participate in any official capacity in any functions carried out by private individuals at the cross site, nor does it condone or promote such activities.

16. After I received the letters from ACLU threatening a lawsuit, I located the private individuals responsible for maintaining the cross and personally met with them to discuss the possibility of having them voluntarily remove the cross. The individuals expressed their unwillingness to remove the cross. They further informed me

that they would replace the cross if it were taken down.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 12th day of March, 2002, at San Antonio, Texas.

By: /s/ MARY MARTIN
MARY MARTIN
Superintendent
Mojave National Preserve

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-EDCV 01-216 RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

Hearing Date: May 6, 2002
10:00 AM

SUPPLEMENTAL DECLARATION OF FRANK BUONO

I am one of the plaintiffs in the above-captioned case, and if called upon to testify, I could and would do so competently as follows:

1. I have read the Defendants' motion for summary judgment and would like to correct a number of statements made in their memorandum, many of which are contrary to statements I have already made in my initial declaration or in my deposition.

2. Defendants have stated that I have "no occasion to travel on Cima Road, except apparently to ascertain whether the cross remains on federal land." Defs' P&A's at 13. They also stated that I have not "been involuntarily exposed to the cross, as [I] voluntarily drive down Cima Road for the sole purpose of viewing it." Defs P&A's at 16. These statements are simply untrue. I have traveled down Cima Road on numerous occasions for reasons unrelated to an intent to see the cross. As I stated in my first declaration, I have traveled on Cima Road frequently in the times I have been in the Preserve, both when I worked there, and after I retired from the National Park Service. Cima Road is one of the six main roads that provide access to the Preserve. Depending on where I am coming from, especially if I am driving from Las Vegas, as I often am, Cima Road is a most convenient means of access to the Preserve, or the portion that I want to visit while I am there.

3. Cima Road also takes you through one of the best, if not the best, Joshua tree forest in the world. Indeed, the Park Service identifies the Joshua trees at the Cima Dome as one of the Preserve's attractions in its Visitor Guide, a copy of which is attached hereto as Exhibit 1. I find Joshua trees to be very lovely, especially when they are in bloom with their creamy white flowers, which typically happens in April. The drive down Cima Road at that time of year is spectacular, and I have driven on the road a number of times to see the trees.

4. I have also gone down Cima Road to access some of the dirt roads that go east off Cima road in order to see some of the abandoned mines and mining equipment in that area. While I would prefer that the Preserve

were in a totally wild state, some of the old mines and equipment are very interesting to look at.

5. Because of my deep attachment to the Preserve, one of the reasons I visit it is to see that it remains beautiful. I have also traveled down Cima Road to access some of the areas to the east of the Road and discovered what appeared to me to be unauthorized or trespass occupancies, such as houses where people were living on federal lands.

6. I find it somewhat ironic that the Defendants appear to question the extent of my objection to the cross on the ground that I did not personally inform the Park Service about it after my retirement. One of the reasons I did not was because on other occasions that I have brought legal issues to the attention of the Park Service, I have been ignored. For example, in October 1998, I wrote a note to Mary Martin and another Park Service employee about what appeared to me to be unauthorized occupancies in the Preserve. Letter attached as Exhibit 2. They never responded to my note. Another reason was because I had asked the ACLU to represent my interests, and the ACLU was contacting the Park Service to object to the presence of the cross.

7. In future trips, I will visit the same areas again, to see if these unauthorized occupancies remain.

8. In sum, I have traveled down Cima Road on numerous occasions for purposes entirely unrelated to viewing the cross.

9. Defendants are also incorrect that I "may (or may not) travel the long distances required from their homes to visit Sunrise Rock again." Def's P&A's at 17 n.22. As long as my health is good and I can still travel,

I will continue to visit the Preserve regularly, as I have in the years since I retired from the Park Service. In fact, I visited the Preserve in March, 2002. The reason I did not see the cross on that trip was because I did not want to come into contact with it, so I took a different road from the Cima Road. In future trips, I will generally avoid Cima Road so that I can avoid seeing the cross. However, on some occasions, such as when I want to see the Joshua trees in full bloom, I will likely use that road and come into contact with the cross.

10. Attached hereto as Exhibit 3 is a true and correct copy of portions of the National Park Service's Revised Draft General Management Plan for the Mojave National Preserve. That plan shows that 391,694 people visited the Preserve in 1999.

11. Another portion of the Park Service's Revised Draft General Management Plan for the Mojave National Preserve (Exhibit 3), shows that during the months of July through December 1996, an NPS traffic counter showed that, on average, 55 vehicles per day entered the park at the Cima Road southbound. The NPS counts only southbound traffic because the northbound traffic exiting the Preserve would have already been counted at another of the park entrances. However, to obtain an accurate estimate of total daily vehicle traffic on the Cima Road itself, we need to double the count to include northbound traffic. To determine annual vehicle counts multiply 110 by 365 days for a total of 40,150 vehicles per year that traverse the Cima Road or some portion of it.

12. Attached hereto as Exhibit 4 is a true and correct copy of the NPS' Public Use Counting and Reporting Instructions specific to Mojave National Preserve.

These instructions appear in the NPS Website at www2.nature.nps.gov/stats/pdf/mojaci96.pdf. These instructions show that the NPS multiplies number of vehicles by a PPV (person per vehicle) multiplier of 2.4. The NPS' methodology means that its best estimate is that 40,150 vehicles contain 96,360 persons. That figure is the NPS' estimate of the number of persons who annually drove on the Cima Road in 1996. Since the cross is clearly visible from the road, that number is also a sound estimate of the number of people who view the cross on an annual basis.

13. One of the few hiking trails in the Preserve is the Teutonia Peak trail. The trailhead is directly across the Cima Road from Sunrise Rock, and the cross is clearly visible from the trailhead

14. The NPS openly invites people to camp in their vehicles alongside Cima Road roadside at Sunrise Rock from which the cross is several yards away clearly visible. See Exhibit 1.

I affirm under penalty of perjury that the foregoing is true and correct. Executed on April 9, 2002 in Prineville, Oregon.

/s/ FRANK BUONO
FRANK BUONO

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. EDCV 01-216-RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

Deposition of Frank Buono
Taken in [*sic*] Behalf of the Defendants
December 27, 2001

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* * * * *

[50]

A At that time, no.

Q Were you—are you aware if there are any nonfederal lands within the outer boundaries of the Preserve?

A Many. Many nonfederal lands in the Preserve boundary.

Q Are those marked off from federal land in any way?

A Generally on the ground no.

Q As you drive through the Preserve, is there any way to tell whether you are on federal land or non-federal land?

A Except in those few instances where there are houses or structures, you don't know whether the lands are not federally owned or federally owned.

Q When you first saw the cross, did you have any idea whether that was on federal land or not?

A I did not know. I did not know the land ownership.

Q After working at the training academy, what was your next position with the Park Service?

A Labor Day of 1994, I was transferred to full-time detail to work at Boulder City, Nevada, the offices for Lake Meade National Recreation Area, working for Allen O'Neil, superintendent of that park * * *

* * * * *

[60] memory is a little faulty, that was when?

A The summer of '95.

Q The summer of '95. All right.

When you saw the cross, you did not know whether it was on federal land or nonfederal land?

A I did not know.

Q And at that time you were working for the Park Service at Barstow?

A At Barstow.

Q Did you speak to anyone in the Park Service about your observation of the cross?

A No.

Q What was your reaction upon seeing the cross?

A I was curious about it.

Q Curious about what?

A I thought it was somewhat unusual. I mean, I knew that the Mojave National Preserve is primarily federal land with a large amount of inholdings of non-federal land. I thought it would be possible that the cross could be on federal lands. I did not know.

Q You didn't know anything about the history of the cross at that time?

A No.

* * * * *

[85]

A They are two different questions. The park service's mission issue arose in the context of an open public forum. Now, we are talking about just the cross, so in this case, BLM's tolerance of effectively an unauthorized trespass with a symbol placed on federal lands, yes, it's objectionable. And BLM should have removed it.

Q Congress also tolerated the presence of the cross when it passed the CDPA, did it not?

A Congress was completely unaware of the cross when it enacted the CDPA.

Q You don't really have any basis for knowing what Congress may have known, do you?

A From an exhaustive search of the congressional record and the debates leading to this bill, the cross and its existence, the presence is never mentioned once.

Q But the fact that it's not mentioned does not mean that someone in Congress was not aware of it, would you agree?

A I have no idea what's in the minds of individual members of Congress. But from what evidence we have, there is no evidence that any member of Congress was aware of the cross.

Q If someone came in during the night and

* * * * *

[119]

on government owned property; is that a correct statement?

A That's correct.

Q Are you deeply offended by the presense of this cross?

A. Yes.

Q Has that been the case from your initial visit?

A Well, from my initial visit I wasn't sure that it was on government owned land. I wasn't sure it was on federal lands, but since I became aware that it was federal lands, yes.

Q And yet you have not taken—you did not speak to anyone at the Park Service about your feelings about observing the cross on federal land; is that correct?

A You mean, before I retired, after I retired, or while I was employed at Mojave?

Q While you were employed at Mojave to begin with.

A No. I did not, but I didn't know it was on federal land until sometime after I had seen it, and it may have been after I had left Mojave Preserve. I'm not sure when I became aware of its—of the land's status--where the tract of land--

[120]

Q Once you knew it was federal land, at that point—

A Uh-huh.

Q —you became deeply offended?

A Yes.

Q The last sentence of that paragraph, please take a moment to read that, beginning on line 18, The presence of the cross.

MR. ELIASBERG: Just for clarification—

MR. SHOCKEY: Oh, I'm sorry. I apologize, that's not the last sentence; that's the second-to-last sentence.

MR. ELIASBERG: That's what I intended, but you made it clear by explaining what the words were in that sentence, so—

BY MR. SHOCKEY: (Continuing)

Q Please begin with—with—on line 18, The presence of the cross, and read that sentence to yourself.

A Uh-huh.

Q Your statement there is that the—or the statement in this document is that the permanent display adversely affects your use and enjoyment of the area.

What would you do differently to use and [121] enjoy this area if the cross were removed?

A Strangely, it would be two opposite things. One is, I would not go out of my way to visit the cross to determine its continued existence.

And the opposite is, I would not go out of my way or feel compelled to go out of my way to avoid seeing the cross, because it's offensive. So—

Q Do you know if the cross still remains there today?

A I presume that it does, otherwise, we wouldn't be here.

Q When is the last time you saw it?

A Probably in the fall or the spring—the spring of this year.

Q Roughly April?

A March or April.

Q Do you have plans to return to Cima Road and Sunrise Rock in the future?

A Yes. I have plans to go to Mojave in the last weekend of March of next year. And also in the month

of March I plan to sell my house or put my house for sale in Oregon and relocate down to Southern California in the vicinity of Mojave or to Southern Arizona where my trips to Mojave will become much more frequent.

* * * * *

[146]

Q But you don't have any personal knowledge; you've simply heard rumors to that effect?

A I have never observed it.

Q Do you consider yourself a religious man, Mr. Buono?

A Yes.

Q What—do you identify with any particular organized religion?

A Yeah. Uh-huh.

Q What religion?

A Roman Catholic.

Q Do you go to services at a church?

A Yes, I do.

Q And this church has crosses displayed, one can assume? Is that a fair statement?

A Yes.

Q Have you ever had any training or—or—in—in religion or ever been—considered a career in the priesthood?

A No. Training in religion—I mean academically, yes.

Q As a—a Christian and a Roman Catholic, I take it you don't find the cross, itself, offensive?

A Obviously not.

[147]

Q And you don't find a cross standing out in open space by itself offensive?

A I do not.

Q The only thing that's offensive about this cross is that you've discovered that it's located on federal land?

A Correct.

Q But apart from Mr. Hoops, you know of no—no one else has ever approached you and told you that they found the cross offensive, have they?

A No one has ever initiated or sought me out to tell me that.

Q But you have—I think you said you have had some conversations with other people in which you describe your views of the cross—

A Uh-huh.

Q —and some of those individuals, I believe, you said—

A Agreed.

Q —agreed with you that it was offensive.

Have you—did you ever know of a gentleman by the name of John Riley Bembry?

A No.

Q Have you ever heard of him?

A No.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-EDCV 01-216-RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR IN HER OFFICIAL CAPACITY; JOHN J. REYNOLDS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

Hearing Date: May 6, 2002
10:00 AM

DECLARATION OF JEFFREY S. SIKER, PH. D.

I, Jeffrey S. Siker, hereby declare:

1. I am a Professor of Theological Studies at Loyola Marymount University and if called to testify I could and would do so competently as follows:

2. The purpose of this declaration is to explain that the Latin Cross is the central religious symbol of the Christian religion, but not of the other major religious traditions in the United States. Thus, the Latin Cross has important sectarian meaning for those who identify

themselves as Christians, but it is typically viewed as an exclusively Christian symbol by members of other religious traditions. The Latin Cross has two arms, one horizontal, one vertical, at right angles to each other. The horizontal arm is shorter than the vertical

3. I received my Ph.D. from Princeton Theological Seminary in 1989. I earned a Masters of Divinity degree from the Yale University Divinity School in 1981 and a Masters in Religious Studies from Indiana University in 1978. I did my undergraduate work at Indiana University and received a B.A. in religious studies. I was also ordained as a minister in the Presbyterian Church in 1981.

4. I have been teaching theological studies at Loyola Marymount University for 14 years. I am currently also the Director of Graduate Studies in Theology. My specialty is the New Testament, Early Christianity, and the history of biblical interpretation. A copy of my curriculum vitae is attached hereto as Exhibit 1.

5. There are a number of major religious traditions in the United States, which include Christianity, Judaism, Buddhism, Islam and Hinduism.

6. What distinguishes Christianity from these other religions are the following beliefs: 1) Jesus is the Messiah; 2) Jesus is the Son of God; 3) Jesus is the incarnation of God in human form; 4) Jesus was crucified on a Latin Cross and died for humanity's sins; 5) Jesus was raised from the dead on the third day; 6) Jesus reigns with God; and 6) Jesus mediates a salvific new covenant through his sacrificial death on the cross.

7. None of these other religious traditions recognize Jesus as the Son of God, nor do they assign salvific

meaning to Jesus death on the cross. In fact, the death of Jesus on the cross can be interpreted as an indication of his shameful disobedience to God and that he died an accursed death (cf. Deuteronomy 27:26).

8. The Latin Cross is a symbolic representation of Jesus' death on the cross and has exclusively salvific meaning for those who identify themselves as Christians. This symbolic meaning is well articulated in the writings of the Apostle Paul, who wrote to his Corinthian congregation: "I decided to know nothing among you except Jesus Christ and him crucified" (1 Cor. 2:2). Thus, based on my study of religions, including Christianity, I would describe the Latin Cross as an exclusively Christian symbol.

9. Members of non-Christian religions find it inappropriate to venerate the cross in any way because members of those religions do not recognize Jesus as the Messiah or the Son of God, and hence do not believe Jesus' death on the cross has salvific religious meaning.

10. In my opinion, which is based on my academic study, the setting up of a Latin Cross is a sectarian action. In this context the term "sectarian" means that the cross is exclusively associated with one religion (Christianity) while excluding others. Since the cross implicitly invokes the meaning of Jesus' death as salvific, it is inclusive only of Christianity and excludes other religions such as Judaism, Islam, Hinduism, and Native American religions. Hence the Latin Cross is a sectarian Christian religious symbol.

I swear under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed by me this 26th day of June, 2001 in Los Angeles, California.

/s/ _____
Jeffrey S. Siker, Ph. D.

Second Supplemental Declaration of Frank Buono

I, Frank Buono, hereby declare:

1. I am a plaintiff in the above-captioned action. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. I worked for the National Park Service (NPS) for 25 years until my retirement in 1997. I worked as an assistant superintendent in the Mojave National Preserve for a little over a year during 1994 and 1995. I have also continued to return to the Preserve regularly since my retirement. I have traveled extensively in the Preserve and am very familiar with it, including its paved roads, and major attractions. I am also very familiar with laws and regulations governing the National Park Service (NPS) and its management of National Parks and National Preserves. I have taught a class in National Park Service laws, regulations, and policies to NPS employees for 18 years.

3. The area in the Mojave Preserve around Cima Dome, where the Mojave Cross is located, is significant for a number of reasons. First, it is only about 15 miles from an interstate highway and is also adjacent to Cima Road, one of the few paved roads in the Preserve. Second, the National Park Service identifies Cima Dome as one of the major natural attractions in the Preserve. The page 4 of the introduction for the General Management Plan (GMP) for the Preserve states that "the Joshua Tree forest of Cima Dome and Shadow Valley is the largest and densest population of Joshua trees in the world." (the GMP can be found at www.nps.gov/moaj/mojafeis3/MOJA_GMPiv_8.pdf, portions of which is at-

tached hereto as Exhibit 1). The GMP Introduction also states at page 4, "[t]he Preserve is internationally known as a place to conduct desert research, and its lands are known for their geological features such as Cima Dome, the Cinder Cones, and the Kelso Dunes." *Id.* Third, the land on which the Mojave Cross is located lies at both the trail head for the hiking trail to Teutonia Peak, one of the few hiking trails in the Preserve, as well as one of the designated camping areas in the Preserve. In fact, there are only two constructed hiking trails in the Preserve, and the Teutonia Peak hiking trail was built to provide access to an area of spectacular beauty.

4. I am also familiar with the 5 acres of land that the Sandozes are giving to the NPS in exchange for the NPS's transferring the land on which the Mojave Cross sits to the VFW post under Section 8121 of Public Law 108-87. I have reviewed the map of the Preserve published by the Bureau of Land Management in order to confirm my recollection that that five acre parcel is in a very remote section of the Preserve. A true and correct copy of a portion of that map is attached hereto as Exhibit 2. The land can be found on that map in quadrant T14N, R.15E, Sec. 15. The land is also quite inaccessible to visitors in the Preserve, because it is abutted on three sides by private land. It is not close to any paved roads and is accessible only by an unmaintained dirt road. Indeed, the recreation map that NPS sells at the Preserve's Visitor Center states that a 4 wheel drive vehicle may be necessary to travel on that road. A true and correct copy that map is attached hereto as Exhibit 3. The five acre plot is not near any significant attractions of the Preserve, such as Cima Dome, the Kelso Dunes, or

the Kelso Depot, nor is it close to any of the Preserve's hiking trails or camp sites.

5. The boundary map of the Preserve, which is included in the GMP, reveals the current legal boundaries of the Preserve. A true and correct copy of that map is attached hereto as part of Exhibit 1. The land on which the Mojave Cross sits is within the Preserve boundaries, as is the Sandoz's five acre parcel that is to be transferred pursuant to Section 8121, even though that land is privately owned. All land that is within the Preserve boundaries is subject to varying degrees of NPS regulation. However, land that is not within the boundaries of the Preserve would not be subject to any NPS regulation.

6. In my 25 years working for the NPS, I have been aware of numerous land acquisitions and land transfers effected by law. Specifically, the Land and Water Conservation Fund Act of 1964 gives the Secretary of the Interior authority to exchange federal lands for privately owned lands. Moreover, Congress sometimes enacts special legislation to effect land transfers. Occasionally, where the NPS transfers land that is at the periphery of an NPS area, the boundaries of the NPS service area will be redrawn to remove the transferred land from the area. However, in all my years working for the NPS, I have never heard of a transfer of federally owned land that is deeply within the boundaries of a National Park or Preserve for privately owned land within those boundaries, where one of the provisions of the transfer was to redraw the boundaries of the National Park or Preserve to place the land transferred to private hands outside the boundaries of the Park or Preserve. In this case, the transferred land is about 15 miles from the

boundaries of the Preserve, in effect creating a one-acre donut hole in the midst of the Preserve's boundaries.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 23rd day of November, 2004 in Sierra Vista, Arizona.

_____

Frank Buono

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUN 1 - 2009
OFFICE OF THE CLERK

No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross in a remote area within what is now a federal preserve as a memorial to fallen service members. After the district court held that the presence of the cross on federal land violated the Establishment Clause and permanently enjoined the government from permitting its display, Congress enacted legislation directing the Secretary of the Interior to transfer an acre of land including the cross to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, and the court of appeals affirmed. The questions presented are:

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

PARTIES TO THE PROCEEDINGS

The petitioners are Ken L. Salazar, Secretary of the Interior; Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, Department of the Interior; and Dennis Schramm, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior.

The respondent is Frank Buono.

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In the Supreme Court of the United States

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v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 54a-85a, 100a-113a) are reported at 527 F.3d 758 and 371 F.3d 543. The opinions of the district court (Pet. App. 86a-99a, 114a-144a) are reported at 364 F. Supp. 2d 1175 and 212 F. Supp. 2d 1202.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. The judgment was amended and a petition for rehearing was denied on May 14, 2008 (Pet. App. 35a-85a). On August 6, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 11, 2008. On August 28, 2008, Justice Kennedy further extended the

time to and including October 10, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on February 23, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Pertinent statutory provisions are set forth in the joint appendix. J.A. 43-47.

STATEMENT

1. In 1934, the Veterans of Foreign Wars (VFW) erected a memorial to fallen service members. The memorial was in the form of a wooden cross set atop an outcropping known as Sunrise Rock in San Bernardino County, California. Pet. App. 56a, 101a. The cross was accompanied by a plaque identifying it as a war memorial that read: "'The Cross, Erected in Memory of the Dead of All Wars,' * * * 'Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884.'" *Id.* at 56a. Private parties have since replaced the cross several times, but there is no longer a plaque at the site. *Ibid.* The current cross is between five and eight feet high and is constructed of four-inch diameter metal pipes that are painted white. *Id.* at 55a.

At the time the VFW erected the cross, Sunrise Rock and the surrounding lands were under the authority of the Bureau of Land Management. Pet. App. 117a. In 1994, the Bureau transferred the lands to the National Park Service (Park Service) as a result of the California Desert Protection Act of 1994, 16 U.S.C. 410aaa *et seq.* Pet. App. 117a. That Act created the Mojave National

Preserve (Preserve), which encompasses approximately 1.6 million acres of land in the Mojave Desert. *Ibid.*; *id.* at 55a. Slightly more than 90% of that land is federally owned, with approximately 86,000 acres owned by private individuals and 43,000 acres owned by the State of California. *Ibid.*

The Preserve is located in southeastern California, approximately 60 miles east of Barstow, California. Pet. App. 116a-117a. It is bounded to the west and north by Interstate 15, which runs northeast from Barstow to Las Vegas, Nevada; and it is bounded to the south by Interstate 40, which runs east from Barstow to Flagstaff, Arizona. *Ibid.* On the northwest side of the Preserve, a narrow blacktop road, Cima Road, runs to the southeast through part of the Preserve. *Id.* at 118a. That road connects Interstate 15 with Cima, California, a town of roughly 21 people located within the Preserve. See U.S. Census Bureau, *Population Finder: Zip Code Tabulation Area 92323* <http://tinyurl.com/CimaPopulation>.

Sunrise Rock is located on the north side of Cima Road, about 11 miles from Interstate 15 and 7 miles from Cima. Pet. App. 118a. It is in a "remote location" that is part of the "natural desert environment." *Id.* at 111a, 122a. There are no buildings or signs of human habitation. *Id.* at 122a. According to respondent, the only visible signs of human activity are off-road vehicle tracks and a parking area for trail hikers. *Ibid.*; see *id.* at 125a. Sunrise Rock rises 15 to 20 feet above grade, *id.* at 111a, and the cross is visible to vehicles on Cima Road from a hundred yards away. *Ibid.*

2. The memorial has been the subject of several pieces of federal legislation. In 1999, the Park Service denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross.

Pet. App. 56a-57a. The following year, Congress prohibited the Park Service from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001 (2001 Act), Pub. L. No. 106-554, App. D, § 133, 114 Stat. 2763A-230. One year later, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. That legislation also ordered the Secretary of the Interior (Secretary) to acquire a replica of the original plaque and cross, to install the replica plaque at the memorial, and to determine by survey "[t]he exact acreage and legal description of the property" included in the memorial. § 8137(b) and (c), 115 Stat. 2278. Then in 2003, Congress prohibited the spending of any federal funds to remove any World War I memorial. Department of Defense Appropriations Act, 2003 (2003 Act), Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551.

3. Alleging that the presence of the cross on federal land violates the Establishment Clause, U.S. Const. Amend. I, respondent filed this action in March 2001. Pet. App. 58a, 115a. Respondent lives in Oregon, but alleged that he regularly visits the Preserve, where he was formerly employed as Assistant Superintendent. *Id.* at 104a-105a, 121a-122a. A practicing Roman Catholic, respondent never complained about the cross during his Park Service employment, and he "does not find a cross itself objectionable." *Id.* at 123a. Instead, respondent asserted that he is offended by the display of a

cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. Respondent claimed that he would avoid the cross on future visits to the Preserve. Pet. App. 107a.

The district court entered judgment for respondent, Pet. App. 114a-144a, and permanently enjoined the government from "permitting the display of the * * * cross," *id.* at 146a. The court held that respondent has standing because he was "subjected to an unwelcome religious display, namely the cross." *Id.* at 131a. The court then held that the presence of the cross on federal land violates the Establishment Clause because "the primary effect of" the public display of the cross "advances religion." *Id.* at 139a. The court of appeals stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross." *Id.* at 87a. The government subsequently covered the cross with a large plywood box, and the cross remains so covered. *Id.* at 56a, 88a.

4. While the government's appeal was pending, Congress enacted legislation ordering the Secretary to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. The legislation directed the Secretary to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d),

117 Stat. 1100. Congress further provided that, "[n]otwithstanding the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" set forth in Section 8137 of the 2002 Act and that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." § 8121(a) and (e), 117 Stat. 1100.

5. The court of appeals affirmed the district court's judgment. Pet. App. 100a-113a. As a threshold matter, the court held that the case had not been rendered moot by the 2004 Act, because "the land transfer could take as long as two years to complete." *Id.* at 103a. Even after the land transfer, the court continued, "the land may revert to the federal government" under the terms of the 2004 Act and other federal statutes allowing the government to accept or acquire ownership of private lands. *Id.* at 103a. "[E]xpress[ing] no view as to whether a transfer completed under section 8121 [of the 2004 Act] would pass constitutional muster," the court "le[ft] th[e] question for another day." *Id.* at 104a.

The court then held that respondent had standing to challenge the cross. Pet. App. 104a-107a. The court reasoned that respondent had suffered a "concrete, personalized injury" rather than "an abstract generalized grievance," because he "will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing." *Id.* at 105-107a (citation omitted). Accordingly, respondent is "unable to freely use the area of the Preserve around the cross." *Id.* at 107a (internal quotation marks, brackets and citation omitted). The court concluded that respondent's "inability to unreservedly use public land suffices as injury-in-fact." *Ibid.*

On the merits, the court of appeals held that the case was "squarely controlled" by its prior decision in *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam), which held that a cross displayed in a city park violated the Establishment Clause. Pet. App. 108a. Although that case involved a "fifty-one foot concrete Latin cross with neon inset tubing" that was first identified as a war memorial more than 30 years after it was erected, *id.* at 108a, the court declared those factual distinctions "of no moment," *id.* at 111a. For the court, the Sunrise Rock cross's "shorter height," "remote location," and "placement by private individuals" made it "no less likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer." *Id.* at 111a-112a.

6. On remand, respondent filed a motion to enforce or modify the district court's earlier permanent injunction. He asserted that Congress's transfer of the land was an unlawful attempt to evade that injunction. The district court agreed because, in the court's view, "the government's apparent endorsement of a particular religion has not actually ceased," and "the proposed transfer of the subject property can only be viewed as an attempt to keep the * * * cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 94a, 97a. The court therefore permanently enjoined the government "from implementing the provisions of Section 8121 of [the 2004 Act]." *Id.* at 99a.

7. a. A panel of the court of appeals affirmed. Pet. App. 1a-34a; see *id.* at 54a-85a. The panel observed that "the Seventh Circuit [had] adopted a presumption that 'a sale of real property is an effective way for a public

body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances.'" *Id.* at 25a n.13 (quoting *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (*Marshfield*)). Nonetheless, the panel "decline[d] to adopt such presumption." *Ibid.* Instead, the panel determined that the 2004 Act violated the permanent injunction granted to respondent because the transfer would not cause "government action endorsing religion [to] actually cease[]." *Id.* at 25a. Accordingly, the panel held that the land transfer "cannot be validly executed without running afoul of the injunction." *Id.* at 33a.

The court of appeals panel relied in part on what it viewed as "continuing government control" of the property following a land transfer. Pet. App. 26a. The 2004 Act provides for the land to revert to the government if the Secretary determines that the VFW is no longer maintaining a war memorial on the site, and the panel construed that provision to require the VFW to maintain a cross at the site. *Id.* at 21a-22a, 28a-29a. In the court's view, the Park Service also would continue to have "general supervisory and managerial responsibilities" and would have an implied easement to enter the property to install a replica of the original plaque pursuant to Section 8137 of the 2002 Act. *Id.* at 26a, 27a.

The court of appeals panel also relied on three other factors: first, that the land exchange was directed by Congress in an appropriations bill rather than initiated by the Park Service pursuant to agency procedures, Pet. App. 29a-30a; second, that Congress transferred the land to the VFW rather than selling it to the general public, *id.* at 30a-31a; and, third, that Congress engaged in repeated legislative efforts between 2001 and 2004 to preserve and maintain the cross, *id.* at 31a-32a. Accord-

ing to the court, those factors demonstrated that "the government's purpose in this case is to evade the injunction and keep the cross in place" "without actually curing the continuing Establishment Clause violation." *Id.* at 31a, 32a (citation omitted).

b. After the government filed a petition for rehearing, the court of appeals panel amended its opinion to delete the portion that expressly acknowledged a conflict with the Seventh Circuit. Pet. App. 35a-37a; see *id.* at 54a-85a. As amended, the opinion now states that, "to the extent that [the Seventh Circuit's decision in] *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; see *id.* at 77a n.13.

c. With five judges dissenting, the court of appeals denied en banc review. Pet. App. 37a-53a. Judge O'Scannlain's dissent, joined by four other judges, explained that "[t]he opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated." *Id.* at 37a. In the dissenters' view, that "novel rule contravenes governing Supreme Court precedent, creates a split with the Seventh Circuit on multiple issues, and invites courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment." *Ibid.*

SUMMARY OF ARGUMENT

I. Respondent lacks standing under the Establishment Clause to challenge Congress's land transfer. As an initial matter, respondent objects to the display of a cross on public property, but Congress remedied that

asserted injury when it transferred the land into private hands. In any event, respondent objects to displaying the cross on public property only because that property is not an open forum on which other people may erect other displays. Respondent's asserted injury is therefore *not* that he has been subjected to unwelcome religious exercises, indirect coercion, or exclusion from the political community. His alleged injury is only that he must observe government conduct (the use of land for a specific war memorial) with which he disagrees. That alleged injury is insufficient to confer Article III standing. Moreover, prudential considerations counsel against hearing this suit, because respondent seeks only to assert the rights of others to erect displays. His lack of interest in putting up any displays himself renders him an inappropriate plaintiff in this litigation.

II. On the merits, respondent is incorrect that the government must remove a longstanding display that serves important secular purposes. Congress's transfer of the land ends any endorsement of the cross, because henceforth any display on the land will not be attributable to the government. At the least, Congress's transfer of the land presumptively ends any endorsement: in the absence of evidence suggesting that the divestment is not genuine, the transfer should be held to remove any First Amendment issue. There is no such evidence here. Congress acted appropriately in the wake of the district court's injunction: it ended any endorsement of the cross in the way that best promoted the significant governmental objectives of showing respect for this country's fallen service members and avoiding social conflict and divisiveness.

III. A. The court of appeals erred in ascribing any illegitimate purpose to the government. The secular

purpose of the statute is apparent on its face: preservation of a war memorial. There is no evidence that this stated justification is a sham. To find even a hint of such evidence, the court had to look to earlier statutes involving the memorial. But these prior legislative acts are neither relevant nor indicative of anything other than the same secular goal.

B. Contrary to the court's contention, the government will not retain any impermissible control over the property. The Park Service cannot require the VFW either to display or to remove the cross; the site's designation as a national memorial confers no regulatory authority on the Park Service; and the reversionary clause only requires maintenance of a war memorial, not display of the cross or any continuing control over the property.

C. The court also was incorrect in impugning the method of effectuating the land transfer. Congress sensibly transferred the memorial for equal value to its original donor, which as a veterans' group is likely to care appropriately for a war memorial. That the land transfer was mandated in a congressional appropriations act casts no doubt whatsoever on its validity.

D. Finally, the court erred in characterizing the property as a single private inholding within a large expanse of federal land. Many private parcels are located within the Preserve, some in close proximity to Sunrise Rock. Accordingly, as respondent concedes, a visitor to the Preserve cannot assume that any particular parcel of land belongs to the government. At the least, the court should have tailored its remedy by remanding for consideration of limited measures, such as fencing or additional signage, to end any continuing endorsement.

ARGUMENT

I. RESPONDENT LACKS STANDING UNDER THE ESTABLISHMENT CLAUSE

Standing requirements ensure that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)). Accordingly, "federal courts [must] satisfy themselves that the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). That inquiry into standing is "especially rigorous" when, as here, "reaching the merits of the dispute" would require this Court "to decide whether an action taken by one of the other two Branches of the Federal Government [is] unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

To have standing under Article III of the Constitution, a plaintiff must have suffered "an 'injury in fact'—an invasion of a legally protected interest" that was caused by the complained-of conduct. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Among the additional "prudential dimensions" of standing is "the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Here, respondent cannot demonstrate either constitutional or prudential standing.

A. Respondent Lacks Constitutional Standing Because He Lacks The Requisite Personal Injury

1. The doctrine of constitutional standing "is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. When the judiciary "is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury * * * serves the function of insuring that such adjudication does not take place unnecessarily." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Defenders of Wildlife*, 504 U.S. at 576.

Respondent's action violates Article III because it seeks not to redress a personal injury, but instead to vindicate a view of the Establishment Clause—one that requires public property to be open to all, if to any, religious symbols. Respondent has expressly disclaimed any injury, including offense or feelings of exclusion, from the public display or transfer of the cross itself. Respondent testified that he is a Roman Catholic, that he regularly attends mass at a church that displays crosses, and that he "[o]bviously" does not "find the cross, itself, offensive." J.A. 85. Respondent's asserted injury is instead that the property "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. According to respondent, he "strongly object[s] to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs." J.A. 64.

Of course, the government attempted to remedy that injury by transferring Sunrise Rock to a private party. According to respondent, he "*ha*[*s*] *no objection to Christian symbols on private property.*" J.A. 64 (emphasis added); see *ibid.* ("I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property."). Respondent's objection is to the "display of a Latin Cross on government-owned property," J.A. 50, and if the land transfer at issue in this case is allowed to occur, Sunrise Rock will no longer be owned by the government.

2. Even assuming that respondent's statements do not disclaim standing to challenge the transfer for that reason, they run headlong into this Court's precedents disfavoring Establishment Clause standing based on value or policy disagreements. The relevant principles emerge from two contrasting cases. In *School Dist.* v. *Schempp*, 374 U.S. 203 (1963), the Court held that school children and their parents had standing to challenge mandatory Bible readings in school that "directly affected" them, *id.* at 224 n.9, and that "were contrary to the religious beliefs which they held and to their familial teaching," *id.* at 208 (citation omitted). As this Court has explained, *Schempp* stands for the proposition that "[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970).

By contrast, in *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (*Valley Forge*), the Court made clear that mere views about the appropriate scope of the Establishment Clause, however firmly held, do not confer

standing. In that case, the United States had transferred a parcel of land to a non-profit educational institution operating under the supervision of a religious organization. *Id.* at 468. The Court held that the plaintiffs lacked standing to challenge the transfer because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. "That is not an injury sufficient to confer standing under Art[icle] III," the Court stated, "even though the disagreement is phrased in constitutional terms." *Id.* at 485-486. The Court explained that "[i]t is evident that [the plaintiffs] are firmly committed to the constitutional principle of separation of church and State," but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

3. So too here, respondent may be "firmly committed to the constitutional principle of separation of church and State," but he has not proven any injury "other than the psychological consequence presumably produced by observation of conduct with which [he] disagrees." *Valley Forge*, 454 U.S. at 485, 486. Unlike in *Schempp*, respondent has not been subjected "to unwelcome religious exercises." *Id.* at 487 n.22. Similarly, he has not experienced "indirect coercion" from "religious orthodoxy," *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992), nor been made to feel like an "outsider[]" rather than a "full member[] of the political community," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (*Capitol Square*) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Respondent asserts only that he dislikes the absence of an open forum atop Sunrise Rock (although,

as noted below, he himself has no wish to display a symbol there). That objection, however deeply felt, arises solely from respondent's commitment to certain constitutional views. As in *Valley Forge*, such an objection does not count as a cognizable injury for purposes of standing under the Establishment Clause.

4. Respondent asserts that his "personal injury" lies in his "inability to unreservedly use public land." Pet. App. 107a; see J.A. 65 ("I will try to avoid seeing the cross in my future trips to the preserve, even though it may mean going out of my way to do so."). But if, as *Valley Forge* holds, respondent cannot premise standing on the "psychological consequence"—the dislike, distress, or offense, however genuine—"produced by observation of conduct with which one disagrees," then too he cannot premise standing on the costs he incurs to avoid that observation.

Unlike in *Schempp*, respondent has not been "forced to assume special burdens to avoid" unwelcome religious exercises or other cognizable injury. *Valley Forge*, 454 U.S. at 487 n.22. Rather, respondent has chosen to assume certain burdens (most notably, to take a different, less convenient road) to avoid confronting a governmental policy choice with which he disagrees. Such "self-inflicted" injuries do not establish standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Otherwise, plaintiffs could confer standing on themselves by incurring some tangible burden to avoid non-cognizable injuries. See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) ("If offense is not enough, why is a detour attributable to that offense enough?"), cert. denied, 505 U.S. 1218 (1992). The *Valley Forge* Court nowhere suggested that assuming such a cost would be sufficient.

The standing inquiry must turn on the nature of the underlying harm respondent suffers, not on whether he has assumed some cost to avoid it. If simple exposure to the lack of an open forum constituted a cognizable injury, then a plaintiff's need to take a different route in order to avoid that injury surely would give rise to standing. But when the alleged harm that is fairly traceable to the government's conduct is not cognizable for standing purposes, as is true in this case, plaintiffs cannot bootstrap their way into standing by choosing to inflict on themselves an additional or different injury. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003); *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (R.B. Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).[1]

B. Respondent Lacks Prudential Standing Because He Asserts The Rights Of Third Parties

"[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights.'" *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468

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[1] The doctrine of taxpayer standing does not provide an alternative basis for standing because respondent (who has not asserted taxpayer standing) does not challenge a congressional enactment that rests on the Taxing and Spending Clause. See *Valley Forge*, 454 U.S. at 478-480; see also *Hein* v. *Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2565-2566 & n.5, 2569 (2007) (plurality opinion). Instead, as in *Valley Forge*, the taxpayer-standing doctrine is inapplicable because the land transfer "was an evident exercise of Congress's power under the Property Clause, Art. IV, § 3, cl. 2" of the Constitution. *Valley Forge*, 454 U.S. at 480. Although Congress directed the Secretary to install a replica plaque, see 2002 Act § 8137(c), 115 Stat. 2278, any expenditure of tax funds for that purpose is merely incidental to the exercise of Congress's Property Clause authority. See *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968).

U.S. at 751). The requirement that a plaintiff raise only his own rights is based on the "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955, n.5 (1984), courts "would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500.

Even if respondent has constitutional standing, those considerations counsel dismissal of his action. Respondent's suit, in its very essence, seeks to assist the rights of others to participate in an open forum. The action is entirely derivative of what respondent assumes to be other individuals' expressive desires. Respondent has never attempted, nor does he intend to attempt in the future, to erect a display on Sunrise Rock. Respondent complains only that *other* people cannot erect *their own* symbols if they so choose. But nothing prevents those third parties from bringing suit, if and when they are excluded from Sunrise Rock. Rather than await such a suit, should it ever arise, respondent invites this Court to reach out and decide an "abstract question[] of wide public significance" concerning the ways in which the government may cure an Establishment Clause violation. *Warth*, 422 U.S. at 500. The Court should decline respondent's invitation for two reasons.

First, adjudicating disputes brought by plaintiffs who have been directly affected by the challenged government action "assure[s] that concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). "By focusing on the fac-

tual situation" presented when parties assert their own legal rights, this Court ensures that it "face[s] flesh and blood legal problems with data relevant and adequate to an informed judgment." *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (internal quotation marks and citation omitted); see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

In this case, respondent brought suit after someone he knew was denied permission to erect a religious symbol. See Pet. App. 109a. But in many derivative cases of this kind, plaintiffs will have no knowledge of how the challenged policy has been or might be applied. And in this case, the prior application only underscores the presence of other potential plaintiffs who have been or might be directly affected by the challenged conduct. Even if a plaintiff has some familiarity with an application of the policy, courts are better served by placing litigation in the hands of those actually affected, who will present a case with all the "concrete adverseness" that facilitates judicial decisionmaking. *Baker*, 369 U.S. at 204.

Second, and even more important, declining to decide cases involving derivative assertions of rights safeguards the limited role of courts by preventing them from addressing issues that are entirely speculative. Here, no other person or entity may want to erect another display on Sunrise Rock. If that is true, then "judicial intervention [is] unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. This Court should not adjudicate what amounts to a purely hypothetical dispute, especially when it is being urged to declare invalid an act of a coordinate Branch. See *Raines*, 521 U.S. at 819-820; *Valley Forge*, 454 U.S. at 473-474.

For that reason, courts commonly deny standing to plaintiffs who object to governmental action that has not directly affected them, but that has purportedly denied someone else a right secured by the Constitution.[2] Respondent is in no different situation. Allowing him to piggyback on others' potential harms not only would disregard this Court's requirement that a plaintiff suffer personal injury, but also would threaten to "transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Allen*, 468 U.S. at 756 (internal quotation marks and citation omitted).

II. CONGRESS'S TRANSFER OF THE LAND TO A PRIVATE PARTY WILL REMEDY THE ESTABLISHMENT CLAUSE VIOLATION

Even if respondent has standing, he is incorrect that the federal government must tear down a cross that has stood for three-quarters of a century as a memorial to fallen service members. Faced with the district court's decision that the presence of the cross on federal land violated the Establishment Clause, Congress had two alternatives: removal of the cross or divestment of the land. Of those two, Congress reasonably elected to di-

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[2] See, *e.g.*, *In re Navy Chaplaincy*, 534 F.3d 756, 760, 763-765 (D.C. Cir. 2008) (chaplain lacked standing to claim that other chaplains were being discriminated against on the basis of their religion, in violation of the Establishment Clause), cert. denied, 129 S. Ct. 1918 (2009); *Higgason* v. *Farley*, 83 F.3d 807, 810 (7th Cir. 1996) (per curiam) (inmate lacked standing to claim that other prisoners were being denied the right to attend religious services, in violation of the Free Exercise Clause); *Osediacz* v. *City of Cranston*, 414 F.3d 136, 142-143 (1st Cir. 2005) (resident lacked standing to claim that other residents were being subjected to a prior restraint on speech, in violation of the Free Speech Clause).

vest itself of the land by transferring it to the private organization—the VFW—that erected the memorial decades ago. Congress's transfer not only will cure any constitutional violation by ending the government's endorsement of the cross, but also will promote the significant governmental objectives of showing respect for this country's fallen service members and avoiding social conflict and divisiveness. The First Amendment does not prohibit such a sensible and sensitive balance of values.

1. Congress's transfer of the land is a constitutionally permissible way to cure the Establishment Clause violation, because it ends any governmental endorsement of the cross. It is a fundamental tenet of this Court's jurisprudence that private action is immune from the strictures of the First and Fourteenth Amendments, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974), and thus that "an Establishment Clause violation must be moored in government action of some sort," *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring). For constitutional purposes, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Ed.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

Congress respected that "crucial difference" between public and private expressive activity when it attempted to transfer the land on which the cross sits to the VFW. By placing that land in private hands, Congress ended any endorsement of the cross. If the district court's injunction is lifted and the transfer is consummated, the

federal government will be neither financing the cross, *Donnelly*, 465 U.S. at 671, nor displaying the cross on public land, *McCreary County* v. *ACLU*, 545 U.S. 844, 851 (2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 579-587 (1989) (plurality opinion). Following the transfer, a privately financed and designed memorial will be displayed on privately held land. Cf. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring in the judgments) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.").

This Court recently addressed the distinction between government speech and private speech under the First Amendment's Free Speech Clause. See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). It observed that "government-commissioned and government-financed monuments speak for the government." *Id.* at 1133. So do "privately financed and donated monuments that the government accepts and displays to the public on government land," this Court said, because "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Ibid.* Whether the government commissions or finances a memorial, or displays a memorial on its own land, "there is little chance that observers will fail to appreciate the identity of the speaker." *Ibid.*

The converse, of course, is equally true: where, as here, a private party commissions or finances a memorial, and displays that memorial on its own land, observers will not attribute the display to the government. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) ("Pre-

cisely because of their location, such signs provide information about the identity of the 'speaker.'"); *Capitol Square*, 515 U.S. at 786 (Souter, J., concurring in part and concurring in the judgment) ("[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."); *id.* at 800 (Stevens, J., dissenting) ("[T]he location of the sign is a significant component of the message it conveys."). Rather, observers will attribute the speech to the private party who owns the land, and thus there will be no unconstitutional endorsement.

Those general principles are fully applicable in this case. The property's location in the Preserve will not lead observers to assume that the government is the landowner. Approximately 86,000 acres in the Preserve are privately owned, Pet. App. 55a, and those private lands are intermingled with public ones. Respondent himself testified that when he first saw the cross, he did not know whether it was on federal land. J.A. 79. To be sure, a reasonable observer will not know for certain that the land in question is *not* owned by the government. But some such uncertainty exists in many cases, and it cannot be thought to divest private owners, like the VFW, of their expressive rights. Moreover, if Congress's intentions as to this land are carried out, the uncertainty about ownership will diminish. In the 2002 Act, Congress provided for the installation of a replica plaque on Sunrise Rock stating that the cross was "Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of" the VFW. Pet. App. 56a. Such a plaque will indicate to observers that the cross has a private, secular origin and thus that the property is likely to be privately rather than publicly owned.

2. At the least, Congress's transfer of the land is a presumptively permissible way to cure the Establishment Clause violation. Because "there is a presumption of legitimacy accorded to the Government's official conduct," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004), this Court should presume that Congress's transfer of the land is genuine rather than pretextual: in the absence of evidence that the transfer does not comply with applicable federal law, that the government will not receive reasonable compensation for its property, or that the private recipient will not assume the traditional duties of ownership, the Court should accept a land transfer as remedying any constitutional violation arising from the display of a religious symbol on public property.

Such an approach is illustrated by the Seventh Circuit's decision in *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487 (2000). In that case, the City of Marshfield, Wisconsin accepted a 15-foot high statue of Jesus Christ as a gift from a local council of the Knights of Columbus and placed the statue in a public park, where it remained unchallenged for nearly 40 years. *Id.* at 489. After suit was filed challenging the display of the statue under the Establishment Clause, the City sold the parcel of land on which the statue stood to a private group organized to preserve the statue. *Id.* at 489-490.

The Seventh Circuit held that the transfer cured any Establishment Clause violation. "Because it is assumed that a property owner controls expression conducted on its property," the court recognized that "the effect of formal transfer of legal title to property" was "a transfer of imputed expression from a public seller onto a private buyer." *Marshfield*, 203 F.3d at 491. Accord-

ingly, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Ibid.* Looking to the "substance of the transaction as well as its form," *ibid.*, the court found that no such unusual circumstances existed. The private purchaser "ha[d] performed the necessary formalities to effect a transfer of property, paid a fair price and assumed the traditional duties of ownership," and thus "th[e] sale validly extinguished any government endorsement of religion." *Id.* at 492.[3]

The same result should apply in this case. In the 2004 Act, Congress directed the Secretary to transfer to the VFW one acre of land that includes the Sunrise Rock cross, in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. § 8121(a) and (b), 117 Stat. 1100. Congress further directed the Secretary to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d), 117 Stat. 1100. By definition then, the transfer of Sunrise Rock will occur in exchange for equal value. Moreover, there is no evidence that the Secretary will fail to "perform[] the necessary formalities to effect a transfer of property," *Marshfield*, 203 F.3d at 492, or

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[3] Other courts have upheld the divestment of land to cure potential Establishment Clause violations in similar circumstances. See, *e.g.*, *Chambers* v. *City of Frederick*, 373 F. Supp. 2d 567, 572 (D. Md. 2005) (upholding sale of land that included a Ten Commandments monument to the monument's original donor, the Fraternal Order of Eagles); accord *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (same). Cf. *Utah Gospel Mission* v. *Salt Lake City Corp.*, 425 F.3d 1249, 1259-1262 (10th Cir. 2005) (sale of easement to the Church of Jesus Christ of Latter-Day Saints in response to Free Speech Clause challenge; upholding sale against, *inter alia*, Establishment Clause challenge).

that Congress is using the VFW "merely as a straw purchaser, with the intention of continuing to exercise the duties of ownership," *ibid.* To the contrary, the 2004 Act accomplishes a bona fide transfer of the Sunrise Rock cross into private hands.

3. The court of appeals declined to adopt a presumption that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion" in the absence of "unusual circumstances." Pet. App. 76a n.13 (quoting *Marshfield*, 203 F.3d at 491). According to the court of appeals, this Court's "Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area." *Id.* at 77a n.13. That is, of course, true. But the need to evaluate the *facts* of each case does not answer what *legal standard* should be applied to those facts. Thus, although the Seventh Circuit applies a presumption, that court also has "emphasized the case-by-case nature of a court's review of an alleged Establishment Clause violation." *Mercier*, 395 F.3d at 702. A court can presume that public officials act legitimately when they divest land to cure an Establishment Clause violation, while also examining the form and substance of the transaction "to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491.

The court of appeals asserted that this Court's "'public function' cases * * * suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands." Pet. App. 77a n.13 (citing *Evans* v. *Newton*, 382 U.S. 296, 301 (1966), and *Terry* v. *Adams*, 345 U.S. 461, 469 (1953) (opinion of Black, J.)). *Evans* and *Terry*, however, do not address how the transfer of real property to private parties af-

fects analysis under the Establishment Clause of the First Amendment. Rather, *Evans* and *Terry* address whether the performance of governmental functions by private parties can constitute state action for purposes of the Fourteenth Amendment. Those cases hold that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans*, 382 U.S. at 299; see *Terry*, 345 U.S. at 469-470 (opinion of Black, J.). Because Congress has not transferred any "powers or functions governmental in nature" to the VFW, those cases are not relevant here.

In any event, those decisions make clear that a nominally private entity may be treated as a state actor only in very rare circumstances. This Court later explained the holding in *Evans*, which concerned the status of a park under the state action doctrine, as resting on the "extraordinary circumstance[]" that the park's transfer "had not * * * eliminated the actual involvement of the [government] in the daily maintenance and care of the park." *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 159 n.8 (1978). That characterization fully comports with other precedent establishing that private parties are presumed private for purposes of constitutional analysis. See *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'") (quoting *Jackson*, 419 U.S. at 351). This Court has set a high bar for imputing state action to a private party, and, at a minimum, the court of ap-

peals should have set a similarly high bar for imputing government speech to a private party.

4. Divestment of the Sunrise Rock cross not only cures any Establishment Clause violation, but also promotes the important governmental objectives of respecting this Nation's fallen service members and those who seek to honor them and preventing social conflict and divisiveness. While respondent views the cross as a religious symbol, many members of the local and, indeed, national community, most notably veterans and their loved ones, view it as a symbol of the sacrifices of fallen soldiers, and they have been deeply opposed to its removal. Congress sensibly accounted for both points of view by attempting to transfer property that might be thought to convey a religious message and yet to preserve a longstanding war memorial—and in so doing, "to avoid that divisiveness based upon religion that promotes social conflict." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

In the circumstances of this case, Congress reasonably believed that destroying a public war memorial would "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). In 1999, when the Park Service denied a request to erect a Buddhist shrine on Sunrise Rock, it simultaneously indicated its intention to remove the cross. Pet. App. 56a-57a. According to local citizens, removal of the cross was likely to generate "significant public opposition." *Id.* at 120a. Despite that opposition, the Park Service maintained its plan to remove the cross. *Id.* at 120a-121a. At that point, recognizing the probability that the Park Service's proposed action would engender social conflict, Congress intervened—

first by preventing the use of federal funds to remove the cross, then by designating the cross as a national memorial, and finally by transferring the site to the VFW. *Id.* at 57a-62a, 121a.

As in *Van Orden*, Congress was faced with a longstanding, privately donated memorial on public land that communicates a secular message (here, of memoralizing persons killed in battle) and that engendered no opposition through many decades of display. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). And as in *Van Orden*, removal of that memorial would have imposed social costs, and indeed perhaps even "exhibit[ed] a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704; see *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 845-846 (1995). Congress therefore elected to transfer the memorial to the private organization that had erected it, as a means of averting unnecessary social conflict and avoiding disrespect to the Nation's war dead. "[B]y any realistic measure," that transfer "create[s] none of the dangers which [the Establishment Clause] is designed to prevent" and "do[es] not so directly or substantially involve the state * * * in the favoring of religion as to have meaningful or practical impact." *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring).

Indeed, if the Establishment Clause permits the government to *display* a longstanding memorial with a predominantly secular message, *Van Orden*, 545 U.S. at 691-692 (plurality opinion); *id.* at 703-704 (Breyer, J., concurring in the judgment), *a fortiori* it permits the government to *transfer* such a memorial to a bona fide private recipient. Unlike in *Van Orden*, in the present case the government does not seek to communicate a message with some religious content. Rather, the gov-

ernment seeks to *not* communicate such a message—but without conveying any disrespect to the people for whom the symbol is significant or incurring the substantial social costs of appearing to do so. Certainly if the government itself may display some monuments that recognize our Nation's religious heritage, *id.* at 683-84 (plurality opinion); *id.* at 699-700 (Breyer, J., concurring in the judgment), then it may enable a private party to do so. The Establishment Clause does not demand destruction of a cross that has stood for 75 years as a memorial to those who have given their lives in defense of this Nation—and that will stand in the future on purely private ground.

III. THE COURT OF APPEALS' REASONS FOR ENJOINING THE LAND TRANSFER LACK MERIT

At the outset, the court of appeals erred by framing the question presented as whether Congress attempted to evade the district court's injunction and whether the land transfer mandated by Congress would be a "violation of the permanent injunction." Pet. App. 75a; see also *id.* at 66a. Indeed, the court even said that it was reviewing the district court's decision invalidating an Act of Congress for abuse of the district court's discretion. *Id.* at 65a, 66a. Congress's constitutional authority is not, however, subject to the discretion of district courts. The injunction could not divest Congress of its "authority to alter the prospective effect of previously entered injunctions." *Miller* v. *French*, 530 U.S. 327, 344 (2000). Nor could it divest Congress of its authority to legislate a remedy for any Establishment Clause violation. Simply put, the previously issued injunction did not bar the Act of Congress at issue.

The actual question presented to the court of appeals was whether the Establishment Clause bars the Act of Congress at issue.[4] It does not. The court of appeals relied on four factors in reaching the contrary conclusion: (A) the government's efforts to preserve Sunrise Rock as a war memorial; (B) the government's supposed control over Sunrise Rock following the transfer; (C) the government's method of effectuating the transfer; and (D) the government's creation of a private inholding within the Preserve. None of those factors renders unconstitutional Congress's decision to remove any Establishment Clause violation in a way that would simultaneously convey respect to fallen members of the armed services and avoid religious and social divisiveness.

A. Congress's Efforts To Preserve Sunrise Rock As A War Memorial Do Not Undermine The Transfer's Validity

The court of appeals enjoined the land transfer in part because of "the government's long-standing efforts to preserve and maintain the cross." Pet. App. 83a. According to the court, those efforts lead "to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place," *ibid.*, "without actually curing the continuing Establishment Clause violation," *id.* at 84a (citation omitted). The court's reasoning ignores the legitimate secular purpose that is set forth in the 2004 Act, and instead focuses on the purposes underlying earlier stat-

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[4] That question, the parties agree, is subject to de novo review. See Gov't C.A. Br. 12 ("The district court's underlying legal determinations are reviewed de novo, as is the district court's conclusion that the United States violated the Establishment Clause.") (internal quotation marks and citation omitted); Resp. C.A. Br. 10 ("Plaintiff agrees with Defendants' statement of the standard of review.").

utes. And indeed, even those earlier statutes had the same secular purpose as the 2004 Act: the preservation of a longstanding memorial dedicated to the remembrance of fallen service members.

1. The court of appeals' analysis began from a mistaken premise: that the 2004 Act is part of the government's "long-standing efforts to preserve and maintain the cross" in order "to evade the injunction." Pet. App. 83a. In 2001, Congress prohibited the use of federal funds to remove the cross, see 2001 Act App. D, § 133, 114 Stat. 2763A-230; and in 2002, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war," 2002 Act § 8137(a), 115 Stat. 2278. Those two statutes, however, predate the district court's permanent injunction preventing display of the cross.

Only after the district court enjoined the government from displaying the cross, did Congress pass the 2004 Act under review. That Act directs the Secretary to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. 2004 Act § 8121(a) and (b), 117 Stat. 1100. In the event that "the Secretary determines that the conveyed property is no longer being maintained *as a war memorial*, the property shall revert to the ownership

of the United States." § 8121(e), 117 Stat. 1100 (emphasis added).

On its face, the 2004 Act does nothing "to preserve and maintain the cross." Pet. App. 83a. It requires only that the VFW maintain the conveyed property as "a" war memorial, not "the" war memorial that had been designated in the 2002 Act. See 2004 Act § 8121(e), 117 Stat. 1100 ("The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I."). Moreover, the memorial that was designated in the 2002 Act included both the "five-foot-tall white cross" and "a limited amount of adjoining Preserve property." § 8137(a), 115 Stat. 2278. By contrast, in the 2004 Act, Congress required only that the "parcel of real property"—not the cross—be maintained as a war memorial. § 8121(a), 117 Stat. 1100; see § 8121(e), 117 Stat. 1100 (requiring that "the conveyed property" be maintained as a war memorial). The court of appeals was therefore squarely mistaken that "the cross itself is the memorial" and "[n]othing permits the VFW to * * * remove the cross." Pet. App. 73a. The 2004 Act does not mention a cross, let alone require the VFW to display one. To the contrary, once the property is conveyed, how to commemorate World War I veterans will be up to the VFW; and whether the VFW elects to display the cross or other symbols (or both), its choice will no longer be attributable to the government. See pp. 22-23, *supra*.

2. The court of appeals surmised on the basis of "historical evidence of the governmental responses aimed at preserving the cross" that "the government's purpose in this case is to evade the injunction and keep the cross in place." Pet. App. 83a-84a. In other words,

the court determined Congress's purpose in enacting the 2004 legislation by harking back to previous congressional efforts and imputing the motivations it found there to the different legislation at issue in this case. Moreover, the court took that approach even though no evidence relating to the 2004 Act itself indicated any illegitimate purpose. That course of reasoning departs from settled interpretive principles and manifests disrespect for a coordinate Branch of government.

a. The court of appeals erred by invalidating the 2004 Act based on speculation about Congress's purpose. In light of the presumption that public officials act within constitutional bounds, *Favish*, 541 U.S. at 174, in the Establishment Clause context "the Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); see *McCreary County*, 545 U.S. at 864. Such deference is, of course, not limitless, *id.* at 864-865, but as the dissent observed, "Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." Pet. App. 44a (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

In the present case, a legitimate secular purpose appears on the face of the 2004 Act: to preserve "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." 2004 Act § 8121(a), 117 Stat. 1100; see 2004 Act § 8121(e), 117 Stat. 1100 (requiring that the VFW "maintain the conveyed property as a memorial commemorating United States participation in World

War I"); *Paulson* v. *City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc) (recognizing "the undeniably appropriate secular purpose of ensuring the presence of a war memorial" on a public site), cert. denied, 538 U.S. 978 (2003). Instead of speculating about potential illegitimate purposes, the court of appeals should have presumed that Congress acted for the legitimate secular purpose set forth in the 2004 Act.

b. Nor does any evidence rebut the presumption that Congress acted constitutionally. This Court has held that an examination of legislative purpose in the Establishment Clause context looks to "readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County*, 545 U.S. at 862. The inquiry is whether an "objective observer" would find a "predominantly religious purpose" based on "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Ibid.* (internal quotation marks and citation omitted). The Court has noted that the inquiry into legislative purpose "has not been fatal very often, presumably because government does not generally act unconstitutionally." *Id.* at 863. Unless the secular justification is a "sham" or "merely secondary to a religious objective," the Court defers to the government's professed purpose. *Id.* at 864.

In the present case, there is no "traditional external sign[]" that Congress's secular justification for the 2004 Act is a sham or a pretense. The Act's text does not suggest a predominantly religious purpose; the Act is unaccompanied by any legislative history; and the Act's implementation was enjoined before the property could be conveyed to the VFW. For those reasons, neither the court of appeals nor respondent has pointed to any evi-

dence that Congress enacted the 2004 Act for a predominantly religious purpose. See Pet. App. 77a; Br. in Opp. 27. Looking at the 2004 Act, an objective observer would conclude that Congress divested itself of an unconstitutional display—which served the joint secular aims of curing an Establishment Clause violation while preserving a national memorial to fallen service members.

Since *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court has not invalidated an Act of Congress under the Establishment Clause as lacking a secular purpose. On the occasions when the Court has invalidated state statutes, it has done so because the statute's text or history indicated a religious purpose, *McCreary County*, 545 U.S. at 862, or because "the object" of the statute was "patently religious." *Ibid.* The transfer of a war memorial, however, is a far cry from the conscious injection of religion into public schools, whether through mandating prayer, *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); teaching creationism, *Edwards*, *supra*; requiring Bible study, *Schempp*, *supra*; or posting the Ten Commandments, *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam). The present case bears none of the indicia that Congress's secular justification is a sham.

c. The court of appeals pointed, however, to the 2001 and 2002 Acts as evidence that the 2004 Act bears a predominantly religious purpose. Pet. App. 78a, 83a-84a. As an initial matter, those previous statutes did not themselves have a predominantly religious purpose. In the 2001 Act, Congress prevented the Park Service from spending federal funds to remove the cross. *Id.* at 57a. There is no evidence of Congress's purpose, but the obvious effect of the Act was to maintain the status quo while Congress considered whether or how to take ac-

tion regarding the cross. In the 2002 Act, Congress designated the cross and adjoining property as a national memorial, but stated that the cross had been "erected by the Veterans of Foreign Wars of the United States in 1934" and that the purpose of the memorial was to "commemorat[e] United States participation in World War I and honor[] the American veterans of that war." § 8137(a), 115 Stat. 2278. Like the 2004 Act, the 2002 Act declares its secular purpose on its face.

In the 2002 Act, Congress also directed the Secretary to acquire and install a replica plaque, § 8137(c), 115 Stat. 2278, which the court of appeals took as evidence of a religious purpose. See Pet. App. 84a.[5] But the original plaque stated: "'The Cross, Erected in Memory of the Dead of All Wars,' * * * 'Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884.'" *Id.* at 56a. Accordingly, a replica plaque would make clear that the cross has a private, secular origin and purpose. The court of appeals faulted Congress for "not repeal[ing] the funding provisions" when it passed the 2004 Act, *id.* at 84a, but nothing is amiss in Congress's providing that the plaque be installed prior to a conveyance of the property to the VFW. If anything, as noted above, the plaque lessens

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[5] While the 2002 Act requires the Park Service to acquire a replica cross, it requires the Secretary to install at Sunrise Rock only the replica plaque, not the replica cross. § 8137(c), 115 Stat. 2278. Accordingly, the provision concerning a replica cross is not relevant to the question presented here. Even assuming it were relevant and constitutionally problematic, the remainder of the statute would be capable "of functioning independently" and thus severable. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). In any event, the Secretary does not intend to acquire a replica cross, much less to install one at Sunrise Rock. Gov't C.A. Br. 39.

any danger that a reasonable observer would attribute the display to the government following the transfer.

Later in 2002, Congress prohibited the spending of any federal funds to remove any World War I memorial. 2003 Act § 8065(b), 116 Stat. 1551. While that Act accomplished nothing new with respect to Sunrise Rock, it served to prevent the destruction of all other World War I memorials on federal land—without regard to whether those memorials incorporate any imagery with religious significance. Thus, although the court of appeals relied on the Act as further evidence of Congress's illegitimate religious purpose, see Pet. App. 83a, the opposite is more nearly true: the Act provides evidence that Congress acted for the legitimate secular purpose of preserving displays with a specific and important cultural and historical meaning.

In sum, both the 2001 and 2002 Acts bear an obvious secular purpose. As the dissent noted, "there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." Pet. App. 47a n.6. Among them are "the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery; the French Cross Monument in the Cypress Hill National Cemetery; the Peace Cross in Bladensburg, Maryland; the Unknown Soldiers Monument in Prescott National Cemetery; and the Wall of Honor at the Pennsylvania Military Museum." *Ibid.* The purpose of these various monuments, memorials and symbols is to commemorate the war dead, not to endorse a religious message.

Respondent disagrees because in his view the Latin cross is "exclusively a symbol of Christiantity," Resp. C.A. Br. 22-23, and thus is "so intrinsically religious," *id.* at 20, that its display cannot possibly have a legitimate

secular purpose. *Id.* at 20-23. This Court, however, recently rejected the notion that "a monument can convey only one 'message.'" *Summum*, 129 S. Ct. at 1135. A display with some religious significance "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Ibid.*; see *id.* at 1136 ("[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure."); *Van Orden*, 545 U.S. at 692 (plurality opinion) (recognizing that the Ten Commandments have "a dual significance, partaking of both religion and government"); *id.* at 701 (Breyer, J., concurring in the judgment). In context, the historical and cultural significance of the cross as a symbol of the sacrifices of fallen service members is not lost on—indeed, is profoundly familiar to—reasonable members of the public. And unless the designation of a cross as a war memorial, such as occurred in the 2002 Act, lacks a secular purpose, it cannot possibly be evidence that the transfer of that same memorial fails the purpose inquiry.

Even assuming, however, that the 2001 and 2002 Acts lacked a secular purpose (which as suggested above would cast constitutional doubt on many public war memorials), they are not evidence that the 2004 Act lacked a secular purpose. Those former Acts predated the injunction against display of the cross. Pet. App. 57a-59a. Faced with that injunction, Congress should be presumed to have selected a legitimate remedy, *i.e.*, a bona fide transfer of the property rather than a sham transaction. By attributing to the 2004 Act a predominantly religious purpose, simply on the basis of Congress's earlier efforts to maintain the memorial, the court of appeals effectively held that Congress's "past actions forever taint any effort on [its] part to deal with the subject

matter." *McCreary County*, 545 U.S. at 873-874. To the contrary, Congress's purpose in the 2004 Act was a legitimate, secular one: to respond to a court's finding an Establishment Clause violation while continuing to remember America's fallen service members.

B. Congress Did Not Reserve Continuing Control Over Sunrise Rock

The court of appeals also enjoined the land transfer in part because of "continuing government oversight and control over the cross and preserve property." Pet. App. 78a (emphasis omitted). The court relied on three factors: (1) the Park Service's general authority over federal lands; (2) Sunrise Rock's designation as a national memorial; and (3) Sunrise Rock's reversion to the government if it is no longer maintained as a war memorial. *Id.* at 78a-81a. None of those factors demonstrates an impermissible level of control. Following the transfer, the government will have essentially the same limited authority over the transferred property that it has over other private inholdings in the Mojave Preserve, and its limited authority will not amount to endorsement of the display or excessive entanglement with religion.

1. The Park Service's "general supervisory and managerial responsibilities" over the Preserve are not relevant to this case. Pet. App. 78a. The Park Service is charged with the duty to "promote and regulate the use of [certain] Federal areas known as national parks, monuments, and reservations." 16 U.S.C. 1. The Preserve is a unit of the national park system and thus within the Park Service's general jurisdiction. 16 U.S.C. 410aaa-42, 410aaa-43 and 410aaa-46. Accordingly, the Park Service may make rules and regulations to govern the use and management of the Preserve. 16 U.S.C. 3.

With respect to the Preserve, however, those statutes do not vest the Park Service with plenary authority over private inholdings. The Park Service has authority over private inholdings within the boundaries of the Preserve only to the extent that activities on those inholdings affect park property. See U.S. Const. Art. IV, § 3, Cl. 2; 16 U.S.C. 1, 2-3, 4; *Hale* v. *Norton*, 476 F.3d 694, 699 (9th Cir.), cert. denied, 128 S. Ct. 804 (2007); *Free Enter. Canoe Renters Ass'n* v. *Peters*, 711 F.2d 852, 855-856 (8th Cir. 1983). That limited and incidental authority does not allow the Park Service to require the VFW (or any other private landowner) to display the cross (or any other symbol) on the VFW's land. Respondent points to nothing remotely suggesting otherwise. Br. in Opp. 20-21. Simply put, once the land is transferred, the decision whether to display or remove the cross will belong to the VFW, not the government.[6]

2. The court of appeals also thought relevant that Congress designated the cross and adjoining property as a national memorial. Pet. App. 78a. That designation, however, has no legal significance. Congress may declare a national memorial on either federal or private land. See, *e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1031, 118 Stat. 2044 (America's National World War I Museum); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1080, 110 Stat. 2670 (National D-Day Memorial); Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164 (Benjamin

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[6] In specific circumstances, the Park Service has additional statutory authority to regulate particular types of inholdings. See 16 U.S.C. 460*l*-22(c) (solid waste disposal sites); 16 U.S.C. 1902 (valid existing mineral rights). Those statutes are not relevant here, and respondent has not argued otherwise.

Franklin National Memorial). Such a declaration, standing alone, does not transfer any regulatory authority over private property to the government.

For that reason, respondent is incorrect that "[i]n light of 18 U.S.C. § 1369, the VFW may well be required to maintain the cross." Br. in Opp. 23. Section 1369 prohibits the destruction of "any structure, plaque, statue, or other monument *on public property* commemorating the service of any person or persons in the armed forces." 18 U.S.C. 1369(a) (emphasis added). Following the transfer, the cross atop Sunrise Rock will not be on public property. Nor is respondent correct that the property will be "under the jurisdiction of" the federal government, 18 U.S.C. 1369(b)(2), because the property is located within the boundaries of the Preserve. Br. in Opp. 23. The Park Service will be able to regulate Sunrise Rock only insofar as activities on those inholdings affect the purposes of federally owned lands.

At the very least, this Court should construe Section 1369—as with the statutes governing the Park Service's authority—to avoid casting constitutional doubt on Congress's transfer of the land. See, *e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)). None of those statutes, fairly interpreted, confers on the federal government any authority to require the VFW to maintain the cross following the transfer.

3. The court of appeals incorrectly concluded that the reversionary clause in the 2004 Act "results in ongoing government control over the subject property, even after the transfer." Pet. App. 80a. That clause provides that if "the Secretary determines that the conveyed

property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." 2004 Act § 8121(e), 117 Stat. 1100. As a threshold matter, the dissent correctly observed that the panel should not even have considered that provision, because the clause "does not constitute state action where the government has not 'made any effort to enforce [it].'" Pet. App. 43a n.4 (quoting *Marshfield*, 203 F.3d at 492-493).

In any event, the determination whether the VFW has ceased to maintain a war memorial on the site will be in the discretion of the Secretary of the Interior. Pet. App. 92a. This Court should presume that the Secretary will exercise his discretion consistently with the Establishment Clause. See *Favish*, 541 U.S. at 174. That is particularly true here for two reasons. First, respondent concedes that the Secretary may interpret the reversionary clause to require only a war memorial, not a cross. See Resp. C.A. Br. 14 n.5 ("[Respondent] is not * * * relying on the possibility that a future government official will interpret the reversionary clause to require a cross remain on the property."). Second, reversionary clauses are common in land transfers.[7] There is no reason to think that the Secretary will ignore constitutional constraints on the exercise of a well-understood authority.

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[7] For example, federal law requires the inclusion of reversionary clauses in deeds disposing of surplus property recommended for use as a public park or recreation area. 40 U.S.C. 550(e)(4). Moreover, reversionary clauses are common where the government wishes to transfer land, but to do so in a manner that preserves the use and character of the land—for instance, as a public park, *Marshfield*, 203 F.3d at 490; or as landscaped space, *Utah Gospel Mission*, 425 F.3d at 1253.

In arguing to the contrary that the reversionary clause makes the Act unlawful, the court relied on a pair of cases dealing with racial discrimination in the 1960s: *Eaton* v. *Grubbs*, 329 F.2d 710 (4th Cir. 1964), and *Hampton* v. *City of Jacksonville*, 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962). Pet. App. 80a. In both *Eaton* and *Hampton*, courts held that although municipalities had transferred racially segregated facilities to private parties, the operation of those facilities continued to constitute state action for purposes of the Fourteenth Amendment. *Eaton*, 329 F.2d at 715; *Hampton*, 304 F.2d at 322-323.

Even assuming that cases concerning state action are relevant here, but see pp. 26-27, *supra*, they are readily distinguishable. In both *Eaton* and *Hampton*, the local governments were "inextricably intertwined with the ongoing operations of the private entity." *Utah Gospel Mission*, 425 F.3d at 1257.[8] The facts in those cases "demonstrate[d] the pervasive nature of the state's role

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[8] Under traditional state action principles, the degree of governmental control following the transfer will not be remotely sufficient to justify treating the VFW's oversight and maintenance of the property as state action. For instance, in *Eaton*, the hospital transferred to a private party was heavily regulated by the state, 329 F.2d at 713; had received a tax exemption, *ibid.*; had exercised the governmental power of eminent domain; *ibid.*; had received state and federal subsidies, *id.* at 713-714; and had given equipment to a state-owned hospital, *id* at 715. No such involvement exists here. And in *Hampton*, after the City of Jacksonville was enjoined from operating racially segregated golf courses, it offered those courses to private parties "on terms very favorable to any prospective purchaser." 304 F.2d at 320. The court distinguished cases in which public facilities "had been sold in a bona fide sale to private parties." *Id.* at 322 (citing *Eaton* v. *Board of Managers of the James Walker Mem'l Hosp.*, 261 F.2d 521 (4th Cir. 1958), cert. denied, 359 U.S. 984 (1959)). Here, the government engaged in a bona fide transfer for equal value to a private party.

in the functioning of" the private facilities, *Eaton*, 329 F.2d at 715, and thus amounted to "extraordinary circumstances" that the "transfer[s] had not * * * eliminated the actual involvement of the [government] in the daily maintenance and care of the [properties]." *Flagg Bros*, 436 U.S. at 159 n.8. Here, the mere fact of the reversionary clause does not inextricably intertwine the government with the daily maintenance and care of Sunrise Rock, nor does other evidence suggest that any such involvement will occur.

Finally, the court of appeals asserted that the 2004 Act grants the government "an easement or license over the subject property," Pet. App. 79a, because it directs the Secretary to "continue to carry out [his] responsibilities * * * under [Section 8137 of the 2002 Act]." 2004 Act § 8121(a), 117 Stat. 1100. Section 8137 of the 2002 Act, in turn, had directed the Secretary, among other things, "to acquire a replica of the original memorial plaque and cross * * * and to install the plaque in a suitable location on the grounds of the memorial." § 8137(c), 115 Stat. 2279. But that provision does not require any ongoing federal control over the memorial following the transfer. The Park Service can install a replica plaque before conveying the property to the VFW. Far from entangling the government with religion, installation of the plaque will underscore the memorial's secular origin and purpose. See, e.g., *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in the judgment).

C. Congress's Method Of Transferring Sunrise Rock Does Not Undermine The Transfer's Validity

The court of appeals reasoned that (1) the transfer of the land to the cross's original donor (2) via a congressional appropriations bill "demonstrate[s] the government's unusual involvement in this transaction." Pet. App. 82a. Neither fact, however, is relevant.

1. The court of appeals levied the serious charge that Congress used the VFW, the organization that originally erected a cross on the site in 1934, as "a straw purchaser" in an effort to "circumvent the injunction in this case." Pet. App. 82a-83a. But as the dissent from the denial of rehearing observed, the panel ignored the logic of transferring the memorial back to its original donor and thus "shrug[ged] off the conflicting holdings in *Marshfield* and *Mercier*." *Id.* at 51a n.10. In *Mercier*, for example, the Seventh Circuit upheld the sale of land that included a Ten Commandments monument to the monument's original donor, in part because doing so "makes practical sense" and recognizes the group's "long-standing and important relationship with the Monument." 395 F.3d at 703; see *Marshfield*, 203 F.3d at 492. Similarly here, the VFW is "the logical purchaser," *Mercier*, 395 F.3d at 705, because it is the organization that erected the cross as a war memorial decades ago and continues to value it highly.

Respondent has proposed two remedies other than transfer of the land, but they illustrate, if anything, the essential reasonableness of what the government chose to do in this case. First, respondent has argued that the government could transfer the cross, but not the land on which it stands, to the VFW. See Resp. C.A. Opp. to Pet. for Reh'g 3. Rather than trade property, respondent contends that the government must remove the

cross—so that the VFW may erect it elsewhere. On this view, nothing prevents the VFW from placing the cross within the Preserve—for instance, on the parcel to be received by the government as part of the exchange. Indeed, on respondent's view, the government presumably could remove the cross and then sell the land to the VFW, at which point the VFW could erect an identical cross. This Court should be wary of an approach that treats the Establishment Clause "not as the embodiment of a grand principle, but rather as empty formalism." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 831 (1995). If respondent's proposed remedies are constitutionally permissible, surely the government's chosen course is permissible as well.

Second, respondent has argued that the government could sell the land to the highest bidder. But nothing in either law or logic requires the government to adopt that approach. Respondent does not cite any authority for the proposition that, to dissipate an endorsement of religion, the government must transfer real property as part of a competitive bidding process. The 2004 Act requires that the government receive market value in the exchange, see § 8121(a), (b) and (c), 117 Stat. 1100; it should make no difference whether that compensation comes through an open sale or a closed exchange. And even assuming the government could realize some marginal additional value from a competitive sale, that does not mean that a transfer for fair value is necessarily a sham transaction. The government may have a strong interest, for example, in transferring a memorial for fallen service members to a party that is likely to maintain it with appropriate care and respect.

What both respondent and the court of appeals really mean in calling for an open, competitive sale is that such

an interest is illegitimate—that the government cannot choose to transfer a war memorial to the VFW rather than to some other party on the view that the VFW will prove an especially good custodian. But this proposition rests on either an unduly narrow view of legitimate governmental interests or on an unduly expansive understanding of the Establishment Clause. In seeking to cure an Establishment Clause violation caused by the religious symbolism involved in a memorial for American war dead, the government may well have to divest itself of the memorial and any continuing participation in its upkeep. But the government may attempt to carry out this divestment in a way that will increase the likelihood that the purchaser will maintain a war memorial in appropriate fashion. The government, that is, can reasonably decide to sell a war memorial not to the highest available bidder, but to veterans willing to pay fair value.

2. The court of appeals also counted as "additional evidence that the government is seeking to circumvent the injunction" the fact that the land exchange was "authorized by a provision buried in an appropriations bill." Pet. App. 81a-83a. The court left unclear whether it was objecting to the simple fact of congressional action on this topic or the choice of an appropriations bill as the legislative vehicle. If the former, the court failed to recognize that congressionally mandated land exchanges are common.[9] If the latter, the court has adopted a

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[9] See, *e.g.*, Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 101(d), 122 Stat. 758 (Mt. Baker-Snoqualmie National Forest property); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 2845, 122 Stat. 554 (Detroit Coast Guard property); City of Yuma Improvement Act, Pub. L. No. 109-454, § 3, 120 Stat. 3369; Federal and District of Columbia Government Real Prop-

novel criterion for reviewing legislation; as this Court has held, Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); see Pet. App. 51a (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("I also am unaware of any precedent disparaging a land transfer for having been enacted in an appropriations bill, nor does the [panel] opinion cite to *any* caselaw in support of such consideration."). If anything, the direct involvement of Congress in this land transfer should reinforce, not undermine, its validity.[10]

In directing this land transfer, Congress required that the exchanged parcels of land have equal value or be equalized through a monetary payment. See 2004 Act § 8121(c) and (d), 117 Stat. 1100. Respondent has never disputed that the government will receive equal value as part of the land exchange. That requirement eliminates

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erty Act of 2006, Pub. L. No. 109-396, 120 Stat. 2711; Act of Dec. 23, 2004, Pub. L. No. 108-483, § 1, 118 Stat. 3919 (Everglades National Park expansion); Act of Nov. 30, 2004, Pub. L. No. 108-417, § 1, 118 Stat. 2339 (Fort Frederica National Monument land exchange); Chickasaw National Recreation Area Land Exchange Act of 2004, Pub. L. No. 108-389, § 4, 118 Stat. 2240; Tapoco Project Licensing Act of 2004, Pub. L. No. 108-343, § 3, 118 Stat. 1372; Eastern Band of Cherokee Indians Land Exchange Act of 2003, Pub. L. No. 108-108, § 138, 117 Stat. 1271; Glen Canyon National Recreation Area Boundary Revision Act, Pub. L. No. 108-43, § 2, 117 Stat. 841.

[10] Although the panel faulted Congress for "act[ing] outside the scope of normal agency procedures for disposing of federal park land," Pet. App. 82a, the dissent correctly observed that no precedent "suggest[s] that *congressional* action is in any way suspect where it fails to adhere to an *agency's* procedural rules," *id.* at 51a. Congress should not be faulted for taking seriously an Establishment Clause violation and electing itself to cure the harm in a direct and timely manner rather than awaiting the outcome of an agency's procedures.

any concern that the government is granting the VFW "a gift in the form of a sub-market rate sale price." *Marshfield*, 203 F.3d at 492; see *Mercier*, 395 F.3d at 702 (same); *Utah Gospel Mission*, 425 F.3d at 1262 (rejecting plaintiffs' claim that sale was pretextual based on adequacy of compensation paid). In such circumstances, the method of effectuating the land exchange rebuts rather than supports the charge that the government improperly favored or endorsed religion.

D. Congress's Creation Of A Private Inholding Within The Preserve Does Not Undermine The Transfer's Validity

1. The court of appeals found that "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with [a] cross atop it—will do nothing to minimize the impermissible governmental endorsement." Pet. App. 85a. The court's analogy is flawed. Approximately 10% of the Preserve is not federally owned, with roughly 86,000 acres owned by private individuals and 43,000 acres owned by the State of California. *Id.* at 55a. Indeed, two private ranches with corrals and related facilities are located within two miles of the cross. J.A. 68. That is hardly surprising. In the American West, private land is commonly intermingled with public land. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2593 (2007); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672, 677-678 (1979). Accordingly, the Act is better viewed as repositioning holes within a slice of Swiss cheese than as creating a tiny donut hole within a large federal expanse.

Even respondent, who worked as an Assistant Superintendent at the Preserve, testified that when he first saw the cross, he did not know whether it was on public or private land. J.A. 79, 81. Respondent explained that,

"[e]xcept in those few instances where there are houses or structures, you don't know whether the lands are not federally owned or federally owned." J.A. 79; see J.A. 81 ("Well, from my initial visit I wasn't sure that it was on government owned land."). Respondent's own testimony makes clear that, following the land exchange, a reasonable observer will not assume that the cross is on federal land. In this respect as well, the court of appeals improperly stretched to invalidate an Act of Congress.

2. Even assuming that the land exchange itself does not cure the Establishment Clause problem, the court of appeals had a duty to tailor its remedy to the nature and scope of the constitutional violation. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 88 (1995) ("equitable remedies" are "to be determined by the nature and scope of the constitutional violation") (quoting *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977)); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982) ("[The equitable powers of federal courts] extend no farther than required by the nature and the extent of th[e] violation.").

A tailored remedy in these circumstances would impose conditions designed to avoid any continuing endorsement rather than invalidate the transfer altogether. For instance, in *Marshfield*, the Seventh Circuit upheld the sale of a challenged display to a private organization, 203 F.3d at 492, but concluded that even after the sale a reasonable observer could perceive endorsement because the private property would be "visually indistinguishable" from public property. *Id.* at 495. The court noted, however, that any continuing endorsement could be remedied by differentiating the private property with a "permanent gated fence or wall * * * accompanied by a clearly visible disclaimer," and it there-

fore remanded for the district court to consider such additional measures. *Id.* at 497.

In this case, Congress already has taken steps to end any continuing endorsement, thus obviating any need for a remand. By ordering the Park Service to install a plaque stating that the cross was erected by the VFW to commemorate fallen service members, Congress has required "a clearly visible" statement of the memorial's secular origin and purpose. Instead of counting that fact against the government, Pet. App. 78a, 83a-84a, the court of appeals should have acknowledged that such a plaque ameliorates any constitutional concerns associated with the transfer. See *County of Allegheny*, 492 U.S. at 619 (plurality opinion); *id.* at 635 (O'Connor, J., concurring); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring); *id.* at 794 (Souter, J., concurring).

At most, the court of appeals might have remanded for the district court to consider limited measures that demarcate the boundaries of the property or that otherwise attribute ownership of the property to the VFW. Such limited measures would have been far more appropriate than an order preventing a private landowner "from exercising its right to free exercise and freedom of speech on its own property," *Marshfield*, 203 F.3d at 497, and requiring destruction of a memorial that has stood for three-quarters of a century as a testament to the sacrifices of America's veterans.

CONCLUSION

The judgment of the court of appeals should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted.

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JUNE 2009

RESPONDENT'S BRIEF

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *et al.*,

Petitioners,

CORRECTED COPY

—v.—

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF

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COUNTERSTATEMENT OF THE CASE

1. A Christian cross[1] sits on a prominent rock outcropping on federal land in an area of California's Mojave National Preserve (the "Preserve") known as Sunrise Rock. Pet. App. 54a, 117a. [2] The cross is visible to vehicles about 100 yards away from Sunrise Rock. Pet. App. 118a.

In 2004, the court of appeals affirmed a district court final judgment holding that Respondent had standing to bring an Establishment Clause challenge to the presence of the cross on federal land and that the cross's presence there violates the Establishment Clause. The court of appeals also affirmed the district court's order permanently enjoining Petitioners from maintaining the cross on federal land. Petitioners did not seek this Court's review of that judgment, which Respondent will refer to as *Buono I*. Accordingly, at this juncture, not a single issue from the court of appeals' ruling in *Buono I* – not Respondent's standing to bring an Establishment Clause challenge to the presence of the cross on federal land, not the ruling that the presence of the cross on federal land violates the Establishment Clause, and not the

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[1] The cross at issue is a Latin cross in that it has two arms, one vertical, one horizontal with the vertical arm being longer. Pet. App. 118a. It is between five and eight feet tall and is made of four-inch diameter pipes painted white. Pet. 55a. A Latin cross symbolizes Jesus's crucifixion. J.A. 89. It is both the preeminent symbol of Christianity and exclusively a Christian symbol, not venerated even by other monotheistic religions. *Id.*

[2] The Preserve encompasses 1.6 million acres of land in the Mojave Desert, over 90 percent of which is federally owned. Pet. App. 3a.

propriety of the permanent injunction – is before this Court.[3]

What is before this Court is the court of appeals' subsequent ruling affirming the district court's order in a collateral proceeding (which Respondent will refer to as *Buono II*) that Respondent brought to enforce the judgment in *Buono I*. In the latter proceeding, Petitioners argued that Congress had remedied the constitutional violation adjudicated in *Buono I* by passing a law authorizing the transfer of the land on which the cross sits to a private party. The court of appeals in *Buono II* rejected Petitioners' argument, held that the land transfer statute did not adequately remedy the constitutional violation, and enjoined the transfer. Given the procedural posture of this case, the only issues now properly before this Court arise from the enforcement order in *Buono II* – namely, whether the transfer completely remedies the constitutional violation and whether the transfer was properly enjoined.

2. In 1934, the Veterans of Foreign Wars ("VFW"), Death Valley Post 2884, first mounted a Christian cross on federal land at Sunrise Rock to honor Americans who had died in combat. Pet. App. 118a. Private parties have replaced the Christian cross several times in the intervening years. A private party, Henry Sandoz, erected the current version of the cross in approximately 1998. Pet. App.

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[3] *See infra* p. 13 (*citing Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (holding that the statutory deadline for seeking review in this Court is "mandatory and jurisdictional").

4a.[4] Neither the VFW nor Mr. Sandoz ever owned the land on which the cross is located. J.A. 71; Appendix to Respondent's Brief 3a ("R. App.").

There is no plaque or sign at or near the cross indicating that it is meant to be a memorial for Americans who died in combat. Pet. App. 118a. The cross has been deemed to have no historic significance: in 1999, the National Park Service ("NPS"), a division of the U.S. Department of the Interior that administers the Preserve, commissioned an historian to evaluate the cross for eligibility for the National Register of Historic Places: the historian concluded that the cross did not qualify. Pet. App. 119a-20a. The cross's religious significance is unambiguous, however: religious adherents have held Easter Sunrise services at the Christian cross for more than 70 years. Pet. App. 119a.

3. There are no other religious displays (or secular ones) permitted in the vicinity of the cross. In 1999, the NPS denied an individual's request to erect a Buddhist memorial (known as a "stupa") in the area near the cross, stating that NPS's "management policies and 36 Code of Federal Regulations 2.62(a) prohibits the installation of a monument, memorial, structure or other commemorative installation." Pet. App. 56a-57a. The NPS further informed the applicant that "[a]ny

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[4] William James famously asked, "Is a knife whose handle and blade are changed the 'same'?" WILLIAM JAMES, PRAGMATISM (1907). While philosophers might therefore debate whether the current version of the cross is the "same" as the original version, in fact, the only thing the two have in common with one another is that each was in the form of a Christian cross.

attempt to erect a stupa will be in violation of Federal Law and subject you to citation and or arrest." Pet. App. 57a.

4. In the late summer of 2000, Respondent, through counsel, wrote to the NPS Director stating that the presence of a Christian cross in the Preserve in these circumstances violated the Establishment Clause. Pet. App. 119a.

Shortly thereafter, on December 15, 2000, Congress enacted, and the President signed, an appropriations bill, a section of which provided that no government funds could be used to remove the Christian cross. Pub. L. No. 106-554, § 113 (2000).

5. In March 2001, Respondent filed a lawsuit in the U.S. District Court for the Central District of California challenging the constitutionality of the government's display of the cross.[5]

In January 2002, while that matter was pending in the district court, Congress passed Pub. L. No. 107-117, a section of which designated the Christian cross as a national memorial commemorating United States participation in World War I. *See* Pub. L. No. 107-117, § 8137 (2002). The law provided federal funds both to install a memorial plaque at the site of the cross and to acquire a replica of the cross that was originally on the site. *Id.* at § 8137(c).

On July 24, 2002, the district court held that Respondent had standing to pursue his Establishment Clause claim, Pet. App. 137a, and

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[5] Allen Schwartz, a co-plaintiff on the first amended complaint, died during the proceedings.

that the presence of the Christian cross on federal land in the Preserve violated the First Amendment. Pet. App. 137a-143a. The court entered a final judgment for Respondent, Pet. App. 145a-146a, stating, in pertinent part: "Defendants . . . are permanently enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." Pet. App. 146a. Petitioners appealed.

Three months after the district court's judgment, Congress again banned the use of federal funds to remove the cross. Pub. L. No. 107-248, § 8065(b).

6. In September 2003, during the pendency of Petitioners' appeal to the Ninth Circuit in *Buono I*, Congress passed Section 8121 of Public Law 108-87. Pet. App. G. This provision calls for the transfer of the property on which the Christian cross at Sunrise Rock sits. Section 8121's authorized land transfer was not based on open bidding or any other competitive process. Rather, the statute directs that the land be transferred to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Preserve that is owned (jointly with his wife) by Henry Sandoz, the private party who had erected the current Christian cross in 1998. Pet. App. 56a; 147a-149a. Although this law transfers the land to a private party, it nonetheless provides that the Secretary shall install the memorial plaque, as previously ordered by Section 8137. *See* Pub. L. No. 108-87, § 8121(a). Another provision of land transfer statute states that if the VFW no longer maintains the property "as a war memorial, the property shall revert to the ownership of the United States." *Id.* at 8121(e).

7. On June 7, 2004, in a unanimous opinion by Judge Kozinski, a panel of the court of appeals affirmed the district court's holdings on standing and the Establishment Clause. Pet. App. 108a-113a. Petitioners argued that Section 8121, which was enacted during the pendency of their appeal, mooted the case. Relying on Petitioners' concession that the "land transfer could take as long as two years to complete," Pet. App. 103a, the court of appeals held that the case was not moot. *Id.* at 102a-104a. The court entered judgment, stating that the district court's judgment was "affirmed." R. App. 1a. The court of appeals did not remand the case for any further proceedings in the district court. *Id.*

Petitioners sought neither en banc review of *Buono I* nor review in this Court. Accordingly, the Ninth Circuit's judgment became final and unappealable on September 7, 2004, 90 days later. 28 U.S.C. § 2101(c).

8. On November 29, 2004, Respondent filed a motion in the district court to enforce, or, in the alternative, to modify, the permanent injunction by expressly prohibiting the land transfer authorized by Section 8121.[6] This motion commenced the collateral enforcement proceeding (*Buono II*), now before the Court.

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[6] Petitioners' brief is imprecise when it states, "*[o]n remand*, respondent filed a motion to enforce or modify the district court's earlier permanent injunction." Pet. Br. 7 (emphasis added). The word "remand" does not appear in the court of appeals' judgment in *Buono I*. R. App. 1a; *see also* Pet. App. 113a.

In April 2005, the district court held that Section 8121's land transfer perpetuated, rather than remedied, the Establishment Clause violation. Pet. App. 86a-99a. The district court "applied the analytical framework" from *Freedom from Religion Foundation v. City of Marshfield, Wis.*, 203 F.3d 487 (7th Cir. 2000), and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), Pet. App. 90a-91a, and held that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants." *Id.* at 97a. The district court barred Petitioners from implementing Section 8121 and ordered the government to comply with the court's existing final judgment and permanent injunction. Pet. App. 99a. Petitioners appealed.

9. In September 2007, the court of appeals affirmed. Adopting the reasoning of the Seventh Circuit in *Marshfield*, the court held that in evaluating whether a transfer of land to a private party has ended an Establishment Clause violation, a court should "examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. App. 76a (citing *Marshfield*, 203 F.3d at 491). Analyzing the form and substance of Section 8121, the court of appeals concluded that the land transfer did not cure the violation. The court relied on the factors identified in the district court's decision: the continued designation of the cross as a national memorial, and the government's resulting ongoing statutory responsibility for "the supervision, management, and control of the cross;" the government's property interest in the land, in the

form of a reversionary interest; the actual method of the exchange; and the history of government efforts to preserve the cross. Pet. App. 77a-84a.

In May 2008, the court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc. Pet. App. 35a-37a.[7] Petitioners then filed a petition for certiorari, which this Court granted on February 23, 2009.

SUMMARY OF ARGUMENT

1. *Standing.* Petitioners' brief contests both Respondent's standing in *Buono I* to challenge the presence of a Christian cross on federal land and his capacity here in *Buono II* to bring the present motion to enforce the permanent injunction.

The former argument is both foreclosed and wrong. It is foreclosed because the lower courts held in *Buono I* that Respondent had standing to challenge the presence of the Christian cross on federal land, and Petitioners never sought certiorari review of that decision. This Court lacks jurisdiction to review a final judgment of a lower court when the petition for certiorari is not filed within the 90-day statutory period. Moreover, principles of res judicata prohibit Petitioners, in an enforcement action, from collaterally attacking the standing ruling that is embodied in the underlying final judgment. In any event, in *Buono I*, Respondent had standing under this Court's precedent because he is directly and personally affected by the religious symbol to which he objects.

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[7] Upon denial of rehearing, the court of appeals amended a footnote in its initial decision that discussed the *Marshfield* case. Pet. App. 35a-37a.

As to *Buono II*, Respondent is the proper party to enforce the permanent injunction entered in *Buono I* because, as the party-plaintiff in that initial action, he is the named beneficiary of the injunction. Respondent's right to enforce the injunction can also be stated in conventional standing terms: Respondent suffered an injury in fact when Congress enacted Section 8121 because he alleges that this statute interferes with the permanent injunction he secured in *Buono I*.

2. *Merits.* The district court entered the permanent injunction in *Buono I* as the remedy for the Establishment Clause violation arising from the government's display of the Christian cross on public land. The district court's holding and the permanent injunction are encompassed in its 2002 final judgment, which was affirmed on appeal in 2004. As it does with standing, res judicata bars any attempt to relitigate the merits of that final judgment.

Thus, the only merits issues now before this Court on the motion to enforce in *Buono II* are whether the land transfer remedies the Establishment Clause violation that necessitated the permanent injunction and, if it does not, whether its effectuation will nonetheless interfere with a full and complete remedy of the violation.

The land transfer does not completely remedy the violation for four independent reasons. *First*, the transfer of the land does nothing to end the federal government's continuing endorsement of the preeminent symbol of Christianity embodied in Congress' designation of that cross as a national memorial. The designation puts this Christian cross in the company of only 45 other designated national

memorials, including the Washington Monument, the Lincoln Memorial, the Vietnam Veterans Memorial, and Mount Rushmore. *Second*, the land transfer is not a real divestment of federal government ownership or oversight of the property. Under Section 8121, Petitioners retain an important property interest in the form of a reversionary clause, which provides that the land will revert to the government if it is not maintained as a World War I memorial. And, other federal statutes require that the government maintain oversight of the property. *Third*, in by-passing the normal government land transfer procedures and mandating to whom the property must be transfered, Section 8121 perpetuates the history of favoritism towards the cross and its sponsors that was a principal factor in the court of appeals' holding that the cross violated the Establishment Clause. *Fourth*, Petitioners' concession that the purpose of the transfer is to keep the cross in place demonstrates that Section 8121 continues the longstanding pattern of congressional legislation. That pattern features – a pair of restrictions on the use of federal funds to remove the cross (one of which was enacted *after* the district court's judgment in *Buono I*); the memorial designation; and now private transfer. Together, these measures aim to ensure the perpetuation of the Christian symbol in the same location. For all of these reasons, Section 8121 is no remedy.

Not only does Section 8121 fail to remedy the Establishment Clause violation, but permitting the transfer would also prevent Petitioners from remedying the violation. This is so because Petitioners will no longer have a present ownership

interest in the land and hence will be unable to remedy the violation, either by giving the cross to the VFW or Mr. Sandoz or by effectuating a transfer of the land on non-preferential terms. Accordingly, the lower courts acted well within their discretion in enjoining the transfer so that Petitioners could undertake such a remedy.

ARGUMENT

I. RESPONDENT'S STANDING IN *BUONO I* IS NOT PROPERLY BEFORE THIS COURT – ALTHOUGH HE CLEARLY HAD STANDING – AND RESPONDENT IS THE PROPER PARTY IN *BUONO II* TO SEEK ENFORCEMENT OF THE PERMANENT INJUNCTION

A. Standing In *Buono I*

1. *This Court Lacks Jurisdiction To Review Respondent's Standing In Buono I*

In *Buono I*, Petitioners contested Respondent's Article III standing. The district court rejected that argument. Pet. App. 130a-37a. That ruling is embodied in the district court's 2002 final judgment. Pet. App. 145a-46a. Invoking the court of appeal's jurisdiction under section 28 U.S.C. §1291 (authorizing appeals from final judgments), Petitioners sought review of the judgment in *Buono I*. Gov't C.A. Br. 1. The court of appeals affirmed the judgment in its entirety in June 2004. R. App. 1a; Pet. App. 113a. Petitioners had 90 days to seek review in this Court, 28 U.S.C. § 2101(c), and they chose not to do so.

By challenging Respondent's standing to sue in *Buono I* in this appeal, Petitioners are attempting to bring an issue before this Court years after the "mandatory and jurisdictional" deadline in 28 U.S.C. § 2101(c) has passed. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Therefore, this Court lacks jurisdiction to consider Petitioners' attempt to seek review of Respondent's standing to bring his Establishment Clause claim in *Buono I*.

In their Petition for Certiorari – although not in their merits brief – Petitioners attempt to evade the 90-day deadline by relying on a passage from *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001), stating that this Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." Pet. 11 n.4. *Garvey* is inapposite, however, because the earlier judgment in that case was interlocutory, not final, as were all the earlier judgments in the cases *Garvey* cites.[8]

In *Toledo Scale Co. v. Computing Scale Co.*, this Court held it could not review issues encompassed in prior *final* judgments, even if the Court later granted certiorari on a subsequent judgment. 261 U.S. 399 (1923). Because the judgment in *Buono I* is final, not interlocutory, the issues resolved by that judgement could be brought before this Court only within 90 days of the court of appeals' June 2004 judgment. 28 U.S.C. § 2101(c).

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[8] *See Garvey*, 532 U.S. at 508 n.1 (citing *Mercer v. Theriot*, 377 U.S. 152 (1964) (*per curiam*); and *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916)).

They were not, and thus this Court lacks jurisdiction to review them during this subsequent proceeding.

2. *The Doctrine Of Res Judicata Bars Petitioners From Collaterally Attacking The Standing Ruling Embodied In The Buono I Final Judgment*

In addition to the 90-day jurisdictional bar, the doctrine of res judicata precludes Petitioners from mounting a collateral attack on the court of appeals' standing ruling in *Buono I*, which was actually litigated between these parties and necessary to the judgment there. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (stating criteria for issue preclusion).[9] Petitioners also attack the judgment in *Buono I* by invoking the doctrine of prudential standing. Pet. Br. 17-20. Although Petitioners did not raise prudential standing as a defense in *Buono I* they are nonetheless barred from presenting it here. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). In sum, res judicata precludes Petitioners from contesting Respondent's standing in *Buono I* in this subsequent enforcement proceeding.[10]

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[9] The resolution of the issue was necessary to the judgment in *Buono I*, for if Respondent lacked Article III standing, the district court did not have jurisdiction. *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 95 (1998).

[10] The federal government is, just like any other party, precluded from relitigating in a subsequent proceeding an issue resolved against it in a final judgment entered in a prior

Just this past Term, in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), this Court reiterated the principle that, in proceedings to enforce an injunction embodied in a final judgment, res judicata bars collateral attack on jurisdictional determinations necessary to the judgment.[11] As part of the Johns-Manville asbestos bankruptcy, claims against its insurer, Travelers, were arguably enjoined as part of a final order entered by the bankruptcy court in 1986. Suits against Travelers nonetheless continued, and the bankruptcy court entered a subsequent clarifying order that the suits were barred by the 1986 injunction. On appeal, the Second Circuit held that the bankruptcy court lacked jurisdication to have entered its 1986 final injunction. *Id.* at 2202. Reversing, this Court held:

> [T]he 1986 Orders became final on direct review over two decades ago. . . . [W]hether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us. . . .

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proceeding involving the same party. *See United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984); *Montana v. United States*, 440 U.S. 147, 164 (1979); *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). To permit the government to relitigate in these circumstances would mean that no judgment against the government could ever be enforced without first being relitigated.

[11] Standing is treated no differently from subject matter jurisdiction for purposes of res judicata. *See, e.g., Cutler v. Hayes*, 818 F.2d 879, 888-89 (D.C. Cir. 1987) (rules of preclusion bar collateral attack on standing ruling that was part of a final judgment); 13B Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3531.15, at 355 (2008) (same); 18 MOORE'S FEDERAL PRACTICE § 132.03[5][d], at 132-35 (3d. ed. 2009).

> *[O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the parties and those in privy with them. . . .*
>
> Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, *for even subject matter jurisdiction may not be attacked collaterally.*

Id. at 2203, 2205 (internal quotations omitted) (emphasis added).

Travelers reaffirmed two longstanding principles of preclusion. First, a party may not attack an earlier final judgment during proceedings to enforce that judgment. *See Sheet Metal Workers v. EEOC*, 478 U.S. 421, 441 n.21 (1986) (motion to enforce a judgment through a contempt proceeding "does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy") (internal quotation omitted); *Maggio v. Zeitz*, 333 U.S. 56, 68 (1948) (when a case is "completed and terminated in a final order, it becomes res judicata and not subject to collateral attack in . . . contempt proceedings"); *Oriel v. Russell*, 278 U.S. 358, 363, 365 (1929) (same). Second, res judicata bars challenges to jurisdictional determinations embodied in an earlier final judgment. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("After a Federal court had decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact."); *accord,*

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment.").

Travelers is indistinguishable from this case.[12] Like the insurer in *Travelers*, Respondent moved to enforce an injunction encompassed in a prior final judgment.[13] Whether the district court lacked jurisdiction to enter that judgment cannot be relitigated in connection with this enforcement proceeding, just as the matter of the bankruptcy court's jurisdiction to issue the final judgment in *Travelers* could not be relitigated in the enforcement proceedings there.[14]

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[12] It is immaterial that the final judgment challenged collaterally in *Travelers* was several decades old – what matters for purposes of res judicata is the finality of the judgment not its age. *See, e.g., Oriel*, 278 U.S. at 363 (issues that were part of October 1926 final order could not be relitigated in March 1927 contempt proceeding).

[13] The fact that Respondent filed the enforcement proceeding in the same court that issued the permanent injunction under the same case number does not alter the conclusion that it is a collateral proceeding. Enforcement proceedings typically occur before the judge who issued the initial final judgment, yet just as typically these proceedings do not permit the relitigation of the initial judgment precisely because that judgment is final. Moreover, the fact that Respondent moved to enforce, rather than selecting the more drastic option of a contempt motion, also does not alter the collateral nature of the proceedings. *Travelers* itself came to this Court on an enforcement proceeding, not a contempt proceeding. *Travelers*, 129 S.Ct. at 2200.

[14] The fact that Respondent did not raise the jurisdictional bar and res judicata arguments at the certiorari stage does not

In sum, Petitioners made a calculated choice not to seek review in this Court of the standing ruling embodied in the *Buono I* final judgment. They are now bound by that choice. *See United States v. Munsingwear*, 340 U.S. 36, 41 (1950) ("The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly

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preclude him from doing so now notwithstanding this Court's S.Ct. Rule 15 ("Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."). First, the rule does not apply if the objections "go to jurisdiction," as they do here. *Id.* Petitioners' failure to seek review of *Buono I* within 90 days of the final judgment deprives this Court of jurisdiction over issues from that case. *See Jenkins*, 495 U.S. at 45. Respondent's res judicata argument also is jurisdictional: it refutes Petitioners' assertion that Respondent lacked standing, which is an attack on jurisdiction in *Buono I*.

Moreover, Respondent's jurisdiction and res judicata arguments do not fall within Rule 15's proscription because they are not arguments "*based on what occurred in the proceedings below*." Sup. Ct. Rule 15. For purposes of Rule 15, the "proceedings below" are the proceedings from which certiorari was granted, *i.e.*, *Buono II*. Because Petitioners never raised *Buono I*'s standing issues at any point in *Buono II*, there are no "proceedings below" on these issues.

Finally, a conclusion that Respondent waived his jurisdictional and res judicata arguments would excuse Petitioners from their failure to seek timely review in this Court of the standing ruling embodied in the final judgment in *Buono I*. Respect for the finality of judgments is a "rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts. . . ." *Moitie*, 452 U.S. at 401 (internal quotation omitted). That command should not be disregarded in favor of a discretionary waiver rule applicable to certiorari proceedings in this Court.

procedure it could have done for itself. The case illustrates not the hardship of *res judicata*, but the need for it in providing terminal points for litigation."); *Moitie*, 452 U.S. at 400-01 (applying res judicata where parties "made a calculated choice to forgo their appeals"). A decision of this Court allowing Petitioners to relitigate Respondent's Article III standing would unravel final judgments and thus undermine the values of consistency and conclusiveness that res judiciata serves. *See Nevada v. United States*, 463 U.S. 110, 129 (1983).[15]

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[15] Petitioners did not seek relief from *Buono I* under FRCP 60(b)(4), nor could they have done so successfully. While that rule enables avoidance of "void" judgments, it has been interpreted to permit collateral attacks on the jurisdictional premise of a final judgment only when there is "no arguable basis" that the court that entered the judgment had jurisdiction. *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (internal quotations omitted). With both the district court and the court of appeals having carefully considered the question and found standing to exist, it cannot seriously be gainsaid that there was "no arguable basis" for standing in *Buono I*. In fact, as set forth more fully below in Section I(A)(3), Respondent plainly had standing.

Moreover, when litigants have forgone appeals, they are generally foreclosed from turning to FRCP 60. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950) (denying relief under FRCP 60(b) because movants made a "free, calculated, deliberate choice[]" not to appeal judgment); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (relief from judgment under FRCP 60(b)(4) precluded where movant chose not to appeal the jurisdictional ruling of the court that entered the judgment).

3. *Respondent's Direct And Unwelcome Contact With A Religious Symbol On Government Land Gave Him Article III Injury To Bring His Establishment Clause Claim*

Even if the Court had jurisdiction to consider standing from *Buono I* and permitted Petitioners to wage their collateral attack, it would fail under this Court's precedents.

This Court has repeatedly recognized that persons who suffer noneconomic injuries may have Article III standing in Establishment Clause cases. *See Lee v. Weisman*, 505 U.S. 577, 584 (1992) (student had Article III standing to challenge religious invocation and benediction at public school graduation that she planned to attend); *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 n.9 (1963)("[S]chool children and their parents, who are directly affected by the laws and practices [mandating Bible readings in public school] against which their complaints are directed" have standing.). In such cases, the touchstone of Article III standing is direct and unwelcome contact with government action that is alleged to be impermissibly religious in nature. *Schempp*, 374 U.S. at 225 n.9. Thus, for example, a person who is subjected to unwelcome exposure to religious exercises, or who incurs burdens to avoid them, has suffered a cognizable Establishment Clause injury conferring Article III standing. *Id. Accord Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982) ("The Plaintiffs in *Schempp* had standing . . . because impressionable schoolchildren were subjected to

unwelcome religious exercises or were forced to assume special burdens to avoid them.").

Likewise, a person who experiences unwelcome direct contact with a religious symbol that sits on government property has Article III standing. This standing principle is implicit in cases such as *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), where plaintiffs objected (on noneconomic grounds) to the presence on government property of Ten Commandments displays to which they were directly and personally exposed.[16] This principle is explicit in myriad appeals court decisions involving noneconomic-based Establishment Clause challenges to religious symbols on government property. *See, e.g., Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (Wilkinson, C.J.); *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc); *Murray v. City of Austin*, 947 F.2d 147, 151-52 (5th Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985).

Under this principle, Respondent had Article III standing to challenge the presence of the Christian cross on federal land in the Mojave Preserve. Undisputed facts in the record show that Respondent had direct and unwelcome contact with the cross and would incur burdens to avoid exposure

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[16] *See Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2540-41 (2008) (citing cases in which standing was unaddressed, and thus assumed, as support for the proposition that persons bringing analogous suits have standing).

to it in the future. Specifically, as the district court found, Respondent is "deeply offended by the cross display . . . [and] will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." Pet. App. 123a. On these facts, the lower courts correctly held that Respondent suffered a cognizable Article III injury and therefore had standing. *Id.* at 107a, 123a.

In collaterally attacking the lower courts' standing rulings, Petitioners claim that Respondent's objection to the cross in the Mojave Preserve rested on a "commitment to a certain constitutional view" regarding religious expression on government property. Pet. Br. 16. They argue that this objection is not a cognizable Article III injury under *Valley Forge* because it reflects the "psychological consequence . . . produced by observation of conduct with which [he] disagrees." *Id.* (quoting *Valley Forge*, 454 U.S. at 485). Petitioners' standing thesis is wrong on multiple levels.

First, Petitioners' thesis is premised on an erroneous assumption. Petitioners claim Respondent has suffered no cognizable injury, but has merely incurred an offense to his "constitutional views," because he is a practicing Catholic who "has no objection to Christian symbols on private property." Pet. Br. 13.[17] But, there is no logic to the assumption

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[17] Petitioners' focus on Respondent's lack of objection to religious symbols on *private property* is at odds with the Petitioners' first question presented, which asks whether Respondent has standing "given that he has no objection to the *public display* of a cross." Pet. Br. (I) (emphasis added).

that a person who takes no offense to a religious symbol on *private* property, therefore only has a non-cognizable objection to the placement of a sectarian religious symbol on *government-owned* property. Devout persons of all faiths – including Catholics – may welcome a diversity of private religious exercise and expression (in churches, temples, and homes, for example), while also objecting to governmental favoritism towards a particular religious sect. That such persons have no objection to private religious activity does not render their objection to government-sponsored or endorsed religious activity a mere "commitment to a constitutional view" that is insufficient to give them Article III standing.

Second, Petitioners' reliance on the "psychological consequences" phrase wrenches it from its proper context in *Valley Forge*. Pet. Br. 15. In *Valley Forge*, shortly after using this phrase, the Court noted that the plaintiffs there were objecting to government action with respect to property located in Pennsylvania, although they lived in Maryland and Virginia; their headquarters were in Washington, D.C.; and they only learned of the action from reading a news release, not from any direct contact with the action. *Valley Forge*, 454 U.S. at 486-87. The Court then contrasted the circumstances of the *Schempp* plaintiffs: they had standing because they were enrolled in the very public schools that conducted religious exercises to which they objected, and thus they were "*directly affected* by the [actions] . . . against which their complaints are directed." *Id.* at 486 n.22 (quoting *Schempp*, 374 U.S. at 224 n.9) (emphasis added). As Judge Kozinski recognized in holding that Respondent had Article III standing, *Valley Forge*

drew a distinction between abstract, generalized objections, which are insufficient for Article III standing, and concrete objections that may result from *direct contact* with the challenged display or practice, which are sufficient. Pet. App. 105a-106a.[18] Here there is no dispute that Respondent had direct contact with the challenged cross.

Third, Petitioners appear to concede that direct exposure to "unwelcome religious *exercises*" is a sufficient Article III injury. Pet. Br. 15 (quoting *Valley Forge*, 454 U.S. at 486-87 n.22) (emphasis added). Yet, Petitioners offer no explanation (and there is none) for their proposition that direct and unwelcome exposure to religious *symbols* is an insufficient Article III injury. Any differences

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[18] The courts of appeal uniformly have interpreted *Valley Forge* in that fashion, not in the way that Petitioners construe it. *See Suhre*, 131 F.3d at 1087 (plaintiff who had regular contact with Ten Commandments display in county courthouse and was offended by it had standing, in contrast to plaintiffs in *Valley Forge* who "were denied standing. . . because they had absolutely no personal contact with the alleged establishment of religion."); *ACLU Nebraska Found.*, 419 F.3d at 775 n.4 (en banc) (adopting the reasoning of the panel opinion, 358 F.3d 1020, 1029 (8th Cir. 2004), which held that plaintiff had standing under *Valley Forge* because he "personally and directly, ha[d] been subjected" to the action to which he objected, and thus had "suffered an injury of a nature and to a degree the *Valley Forge* plaintiffs did not"); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. 1986) (plaintiffs who are offended by religious display that they have direct contact with, and, as a result, go out of their way to avoid it, have standing under *Valley Forge*). *Accord Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1342 (2d Cir. 1991); *Foremaster*, 882 F.2d at 1490; *Hawley*, 773 F.2d at 739-40; *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983).

between religious exercises and religious symbols speak to the merits of the Establishment Clause claims, not to Article III standing. *Compare Weisman*, 505 U.S. at 599 (direct and unwelcome exposure to religious exercises in public school violated Establishment Clause), *with Van Orden*, 545 U.S. at 691-92 (plurality opinion) (direct and unwelcome exposure to Ten Commandments display did not violate Establishment Clause) and *id.* at 703-04 (Breyer, J., concurring in judgment).

Fourth, Petitioners interpret *Schempp* as suggesting that only plaintiffs with objections to government practices that are "contrary to the religious beliefs which they h[old]" have standing to challenge those practices." Pet. Br. 14 (citing *Schempp*, 374 U.S. at 208). This Court's precedents shatter the notion that the only persons who have Article III standing are those who object to government actions that are contrary to their own religious beliefs.

For example, in *Lee v. Weisman*, a Jewish plaintiff objected, as next friend of his daughter,[19] to a rabbi's delivery of a non-sectarian prayer at the daughter's public school graduation ceremony. *Weisman*, 505 U.S. at 584; *Weisman* BIO A9-A10, ¶¶ 36, 43, 47 (Agreed Statement of Facts). In his affidavit, the plaintiff stated that he believed "inclusion of prayer in a public school graduation ceremony suggests government sponsorship of prayer and advances religion." *Weisman* J.A. 1, Relevant

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[19] Daniel Weisman also objected on his own behalf as a municipal taxpayer, but the Court declared that it did not need to consider whether he satisfied the test for taxpayer standing. *Weisman*, 505 U.S. at 584.

Docket Entries, Docket for the District of Rhode Island, Case No. 89-0377B, *Weisman v. Lee*, 6/16/89 (Affidavit of Daniel Weisman, ¶13). The Court sustained plaintiffs' standing to object to the religious practice, even though there was no evidence in the record that this practice was "contrary to the religious beliefs" that the Weismans held. In short, accepting Petitioners' position would require this Court to overrule its standing holding in *Weisman*.

County of Allegheny v. ACLU, 492 U.S. 573 (1989) and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), are similar to *Weisman*. In *Allegheny*, the plaintiffs objected to the presence of a crèche in a county courthouse and menorah outside a municipal building. *Allegheny*, 492 U.S. at 578-79. One of the plaintiffs was a devout Catholic who had a crèche in her own home. *Allegheny*, J.A. 100-01. Other plaintiffs were Jewish and objected to the menorah's display. *Allegheny*, 492 U.S. at 650-51 (Stevens, J., concurring in part and dissenting in part). No member of the Court suggested that the *Allegheny* plaintiffs lacked Article III standing because they objected to symbols of their own religions. Nor did any member of this Court challenge the district court's holding in *McCreary County* that the plaintiffs there had Article III standing to challenge Ten Commandments displays in county courthouses and schools, 96 F.Supp.2d 679, 682-83 (E.D.Ky., 2000), even though plaintiffs did not phrase their objections to the displays as being "contrary to their religious beliefs." *McCreary County*, J.A. 17 (district court docket, entry no. 63, Amended Complaint, ¶¶ 31-33).

The Court's precedents are rooted in the history of the adoption of the Establishment Clause.

The framers of the Establishment Clause intended it not only to protect members of minority faiths from government action that is contrary to their religious beliefs, but also to protect members of majority faiths from government action that supports their religious beliefs. Indeed, the record of the adoption of the Establishment Clause reflects a strong concern that government favoritism of a particular religious sect actually would harm that sect, not benefit it. *See* James Madison, Memorial and Remonstrance against Religious Assessments, Paragraphs 6-7 (1785) (*available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (government support for the established religion will enervate it). In commenting on that history, this Court repeatedly has stated that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to *degrade religion*. . . ." *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (citing Madison, Memorial and Remonstrance); *see also Weisman*, 505 U.S. at 590 ("A principal ground for [Madison's opposition to establishment] was his view . . . [that]: '[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'"); *Lynch v. Donnelly*, 465 U.S. 668, 698 (1984) (O'Connor, J., concurring) (noting Framers' concern regarding government action that favors religion but at the same time degrades it).

Finally, Petitioners' argument that standing only resides with those who object to practices "contrary to the[ir] religious beliefs" is at odds with this Court's recurring concern that judges not inquire

into whether a person's conduct or beliefs are religious in nature. *See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area [of religious beliefs], it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."). *Accord Gillette v. United States*, 401 U.S. 437, 457 (1971). Petitioners' argument defies those teachings because it calls on judges to evaluate standing by ascertaining whether a belief is religious.

The wisdom of those teachings is demonstrated by the problems that would result were the Court to overrule its previous standing holdings and adopt Petitioners' approach. Under that approach, it is unclear whether an atheist who objected to a government sponsored prayer would have standing if she denied that atheism is a religion. Pet. Br. 14 (arguing that challenged practice must be contrary to plaintiff's "religious beliefs"). If plaintiff were a Jewish member of an organization committed to church-state separation, courts would have to determine whether his objection to a cross stemmed from his religious beliefs or his constitutional beliefs. What if a Christian and a Muslim, who shared the view that government misappropriates religious symbols and corrupts religion, challenged the presence on government property of a Christian cross? Would the Muslim, but not the Christian, have standing? These are not inquiries and distinctions that courts can, or should, make.

* * *

In sum, if this Court exercised jurisdiction and permitted Petitioners to reargue Respondent's Article III standing in *Buono I* at this late date, that argument would fail. Respondent suffered direct and concrete injury in fact through unwelcome exposure to the Christian cross, and Petitioners' attempts to escape this conclusion are unconvincing.

4. *The Prudential Standing Doctrine Is Inapplicable To Buono I Because Respondent Sought To Vindicate His Own Rights, Not The Rights Of Third Parties*

Petitioners argue in this Court – for the first time in either *Buono I* or *Buono II* – that *prudential* standing considerations should also have counseled against the exercise of jurisdiction over Respondent's Establishment Clause claim in *Buono I*. As demonstrated above, this Court lacks jurisdiction to hear, and Petitioners are precluded from making, a prudential standing argument at this juncture.

In any event, Petitioners' prudential standing argument rests on the mistaken assumption that Respondent sought to redress not his own injury, but the injuries of third parties who may wish to erect other religious displays at Sunrise Rock. Pet. Br. 18. The lower courts determined that Respondent was personally confronted with, and offended by, government promotion of a sectarian religious symbol and hence that he had standing. Pet. App. 107a; 137a. Nothing in these lower court determinations indicated in any way that he was suing to vindicate the rights of others.

Petitioners misapprehend the relevance of Respondent's reference to their refusal to allow persons to erect other symbols in the area of the cross. The treatment of third parties spoke to the merits of Respondent's claim in *Buono I*, not to his standing to bring it. The government's preferential treatment of the cross reflected impermissible favoritism of one religious sect over others in violation of the most basic Establishment Clause command. *See Larson v. Valente*, 456 U.S. 228, 244-245 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) (giving sectarian private religious speech preferential access to government land would violate the Establishment Clause).

Because Respondent vindicated his own rights, and argued facts about others only to support the merits of his own claim, this Court's prudential standing limitations are irrelevant. *See APCC*, 128 S. Ct. at 2544.

B. In *Buono II*, Respondent Is The Proper Party To Enforce The Judgment Entered In *Buono I*

In addition to their untimely, collateral attack on Respondent's standing in *Buono I*, Petitioners contend that Respondent lacks standing to challenge the land transfer in *Buono II*. Pet. Br. 9-10, 14. Their argument misframes the nature of the proceedings in *Buono II*: Respondent's motion sought to enforce the permanent injunction he had secured as final relief in *Buono I* and his ability to

bring such a motion turned on whether he was a proper party to enforce that judgment – which he clearly was.[20]

Respondent secured a permanent injunction in *Buono I*. Petitioners argue that Congress enacted Section 8121 in an attempt to remedy the violation found there. Respondent initiated *Buono II* by bringing a motion to enforce *Buono I*'s permanent injunction, arguing that Section 8121 failed to remedy the violation. As the party who secured the permanent injunction, Respondent is the proper party to pursue a judicial interpretation of whether Congress' enactment did in fact remedy the violation. *See* 11A WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 2960 (". . .[P]roceedings to enforce a civil remedy . . . should be instituted by the parties aggrieved."). So indisputable is this premise that a party may enforce its own judgment that the only issue addressed in detail in the relevant rules and cases is whether *non-parties* can enforce judgments. *See, e.g.*, Fed. R. Civ. P. 71 (identifying when a nonparty may enforce a judgment in "*the same [way] as for a party*") (emphasis added); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) ("[A] consent decree is not enforceable directly or in collateral proceedings

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[20] In his motion to enforce, Respondent also argued that the land transfer was itself unconstitutional, but neither court below addressed this argument. It is therefore not before this Court. Nonetheless, his allegation that the land transfer interfered with his permanent injunction made him a proper party to pursue that constitutional claim, just as it made him the proper party to pursue the narrower claim decided by the courts below that the land transfer was not a sufficient remedy to *Buono I*'s constitutional violation. *See infra*.

by those who are not parties to it. . . ."); 12 FEDERAL PRACTICE AND PROCEDURE § 3032 (discussing circumstances in which *non-parties* may enforce judgments). Indeed, Respondent is not aware of any case where a court has held that a plaintiff who had obtained a permanent injunction in his favor was an improper party, or lacked standing, to enforce that injunction.

Petitioners frame the issue as one of "standing" not "proper party to enforce," but this framing is to no avail for two reasons. First, Petitioners' argument makes no sense. They quote Respondent's statement in *Buono I* that he "has no objection to Christian symbols on private property," Br. at 14, and argue that since Section 8121 transfers the cross to private land, Respondent therefore lacks "standing" to object to the transfer. *Id.* But, as argued below, Respondent contends that the federal government will continue to retain significant interests in the land and the symbol, thereby failing fully to "privatize" the cross and perpetuating an impermissible government endorsement of religion. This objection to the transfer articulates an injury in fact for standing purposes and refutes the logic of Petitioners' contention that Respondent lacks standing.[21] Moreover, Respondent clearly has standing because in arguing that Section 8121 does not remedy the violation in *Buono I* and interferes with the

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[21] Petitioners' reliance on Respondent's statement is illogical for another reason: it was made in 2002, J.A. 64-65, prior to both the entry of *Buono I*'s judgment and the enactment of Section 8121. Because Respondent's statement was made years before Congress' enactment of Section 8121, it cannot be used as evidence that Respondent has no objection to that statute.

permanent injunction he secured there, he articulates a concrete injury in fact from that enactment.

This Court's recent decision in *Horne v. Flores*, 129 S. Ct. 2579 (2009), provides two distinct analogous situations supporting Respondent's position that he has standing to enforce the *Buono I* judgment. The petitioner in *Horne* brought a Rule 60 motion seeking relief from a final judgment against him. In holding that he had standing to bring that motion, this Court stated that:

> [Petitioner] is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of [a federal law], and the current injunction runs against him. For these reasons alone, he has alleged a sufficiently personal stake in the outcome of the controversy to support standing.

Id. at 2592 (internal quotations omitted). If the defendant in *Horne* had standing to seek relief from a judgment entered *against him*, Respondent similarly has standing to enforce a judgment entered *for him*: as did the defendant in *Horne*, Respondent alleges a "personal stake" in the outcome of this controversy.

Further, in a portion of the court of appeals decision in *Horne* not upset by this Court, the court of appeals sustained plaintiff's standing to argue that an Arizona law (HB 2064) enacted in reaction to a judgment in her favor did not remedy the violation found in the judgment:

> HB 2064 holds itself out as a remedy for Flores and was presented to the court by Arizona and by the [defendants] as such. Whether or not

> Flores would have had standing to challenge HB 2064 in the first instance, *she certainly has standing to argue that a purported remedy will not satisfy a judgment in her favor.*

Flores v. Arizona, 516 F.3d 1140, 1164 (9th Cir. 2008) (emphasis added), *rev'd on other grounds*, *Horne v. Flores*, 129 S. Ct. 2579 (2009). *See also Allen v. Wright*, 468 U.S. 737, 763 (1984) (beneficiary of an injunction has standing to enforce it). Likewise here, Respondent certainly has standing to argue that Section 8121, Congress's purported remedy, does not "satisfy [the] judgment in [his] favor."

II. THE STATUTORY LAND TRANSFER FAILS TO REMEDY THE ADJUDICATED ESTABLISHMENT CLAUSE VIOLATION AND WAS PROPERLY ENJOINED

In *Buono I*, the court of appeals held that the presence of a Christian cross on federal land violated the Establishment Clause because the display of the cross, and the government's favoritism towards private parties who wanted to erect the cross, constituted an impermissible endorsement of Christianity. Pet. App. 108a-112a. That holding is embodied in the final judgment in *Buono I* that was never appealed to this Court, and hence its propriety is not before this Court for the same reason that Respondent's standing in *Buono I* is not properly at issue. *See* Section I(A)(1)-(2), *supra*.

Also not before this Court is the question of whether the land transfer statute is unconstitutional. Neither the district court nor the court of appeals held that the transfer violated the

Constitution.[22] They merely held that the statute did not cure the Establishment Clause violation adjudicated in *Buono I*. Pet. App. 84a-85a; 97-98a. It is this issue – whether Section 8121 cures the Establishment Clause violation – that is before this Court. [23]

Whether a measure proposed to remedy a constitutional violation is sufficient depends on the nature and extent of the violation, *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), and whether the measure will "eliminate so far as possible" the effects of the violation and bar it from recurring, *United States v. Virginia*, 518 U.S. 515, 547 (1996) (internal quotations omitted). Under this standard, the land transfer is an insufficient remedy for any of four independent reasons, as explained in the four sections that follow in Part A, below:

1. the government's endorsement of the Christian cross is not remedied because, by Act of Congress, the cross remains designated a national memorial;

2. the government's endorsement of the Christian cross is not remedied because Petitioners maintain a reversionary interest in, and continued supervisory duties over, the land on which the cross is located;

3. the government's endorsement of the Christian cross is not remedied because the structure

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[22] *See supra* note 20.

[23] Because the lower courts did not adjudicate the constitutionality of the land transfer statute, Petitioners' argument that it had a valid secular purpose under the *Lemon* test is irrelevant. Pet. Br. 34.

of the transfer perpetuates the government's longstanding favoritism towards the cross;

4. the government's endorsement of the Christian cross is not remedied because Congress' conceded purpose, and the history of congressional enactments concerning the land, demonstrate that the transfer was designed to ensure that the Christian cross remained in the very same location on Sunrise Rock.

Because Section 8121 fails to remedy the Establishment Clause violation that was adjudicated in *Buono I*, the court of appeals was correct to enjoin the transfer from going forward. If the land were transferred from the government to private parties, Petitioners no longer could take all the steps necessary to remedy the violation and comply with the district court's injunction. For example, because Petitioners would no longer own the land, they could not effectuate a *bona fide* transfer, one that did not show favoritism to the cross and to the entities who want it maintained in its current location. Nor would the court be able to exercise its inherent authority to enforce its injunction, if necessary. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 690 (1978) (courts have inherent authority to enforce their orders).[24]

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[24] Petitioners create a false dichotomy, arguing that the government's two alternatives in the wake of the injunction were to destroy the cross or give up ownership of the land. Pet. Br. 20, 28. The district court's permanent injunction did not require that the government destroy the cross if it chose to keep the land. Petitioners could simply have removed the cross and returned it to Mr. Sandoz, or given it to the VFW, without "destroying it" or demonstrating any disrespect for Christianity or veterans.

Petitioners would like to pretermit this whole analysis on the grounds that a transfer to private parties removes state action and hence removes the necessity for judicial scrutiny. Pet. Br. 21 ("It is a fundamental tenet of this Court's jurisprudence that private action is immune from the strictures of the First and Fourteenth Amendments. . .") (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)). Petitioners essentially argue not that the ends justify the means, but that the ends eliminate their need to justify the means. But this argument obviously fails: the means the government employs to achieve their ends of privatizing the property – the land transfer statute – itself constitutes state action and hence must comply with the permanent injunction specifically and the Constitution more generally. *See Mercier*, 395 F.3d at 704 (analyzing whether government transfer of land to private parties was permissible under the Establishment Clause).

Moreover, the ends Petitioners tout here are less pure than they would have it: this land transfer does not remove all state action for the reasons identified below. Petitioners' argument would suggest that a cross unconstitutionally placed on city hall steps could be remedied by selling a few of the stairs to private parties. But obviously the Establishment Clause would no more tolerate such an outcome as a cure than it would permit the government to create such a display in the first instance, given the sectarian favoritism that both reflect. *See, e.g, Allegheny*, 492 U.S. at 611 ("[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof

of city hall.") (Kennedy, J., concurring in part and dissenting in part).[25]

A. Section 8121 Fails To Remedy The Adjudicated Establishment Clause Violation Because It Perpetuates Government Favoritism Of A Sectarian Religious Symbol

1. *By Act Of Congress, The Cross Remains Designated A National Memorial*

The Christian cross at Sunrise Rock will

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[25] Short of escaping having to justify their means at all, Petitioners' fall-back position is that their means should enjoy a presumption of validity. Pet. Br. at 24. On the contrary, when the government argues that constitutional violations have been remedied, the burden rests with it to demonstrate the legitimacy of the cure. *See Friends of the Earth, Inc. v. Laidlaw Environ. Serv. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (burden on government to demonstrate mootness); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (burden on government to demonstrate changed circumstances justifying relief from judgment under Fed. R. Civ. P. 60(b)(5)). Nothing in *Marshfield* or *Mercier*, the cases upon which Petitioners' "presumptive remedy" notion rests, supports such a reversal of the normal approach to evaluating proposed remedies in the constitutional context. Equally misguided is Petitioners' contention that because the land transfer is an Act of Congress, it is a "presumptively permissible" remedy. Pet. Br. 24 (citing *National Archives & Records Admin. v. Favish*, 541 U.S 157, 174 (2004)). In fact, *Favish* says nothing about whether an Act of Congress addressing an already-adjudicated constitutional violation should be presumed to be a permissible remedy. Petitioners cite no other case to support deference to Congress in a constitutionally remedial context and Respondent is aware of none. In any event, regardless of where the burden lies, Respondent's arguments demonstrate the failure of the transfer to remedy the constitutional violation.

remain designated a national memorial even after the transfer because the land transfer statute (Section 8121) does not alter the law that designates the cross as a national memorial (Section 8137). That designation undermines the purported curative effect of the land transfer.

As a national memorial, the cross is in a select group. There are only 45 other national memorials in the United States, and the list features some of the nation's most significant and iconic symbols, including the Washington Monument, the Jefferson Memorial, the Lincoln Memorial, the Vietnam Veterans Memorial, the United States Marine Corps Memorial, the Flight 93 Memorial, and Mount Rushmore. *See* 16 U.S.C. § 431 note. As one of the few displays that Congress has designated a national memorial, the cross necessarily will reflect continued government association with the preeminent symbol of Christianity. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment) ("the Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point"). *See also Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) ("a Latin cross . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity"); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1982) ("the [L]atin cross is a universally recognized symbol of Christianity"); Eerdman's Handbook to the World's Religions 340 (R. Pierce Beaver et al. eds., 1982) ("The cross has rightly become the symbol of Christianity"); J.A. 89 ("[T]he

Latin Cross is a sectarian Christian religious symbol.") (Siker Declaration ¶ 15).

The transfer therefore cannot remedy the Establishment Clause violation because it leaves in place the designation of Christianity's preeminent symbol as a national memorial. There has long been a consensus among Justices of this Court that there is no greater offense to the Establishment Clause than government favoritism of one religion over another. *See Allegheny*, 492 U.S. at 603 ("[N]ot even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief."); *Larson*, 456 U.S. at 244-245 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others."); *McCreary County*, 544 U.S. at 909 (Scalia, J., dissenting) (symbol on government land does not violate Establishment Clause if it is "not so closely associated with a single religious belief that [its] display can reasonably be understood as preferring one religious sect over another"); *Weisman*, 505 U.S. at 641 (Scalia, J. dissenting) ("[O]ur constitutional tradition . . . rule[s] out of order government-sponsored endorsement of religion – even when no legal coercion is present, and indeed even when no ersatz, 'peer-pressure' psycho-coercion is present – where the endorsement is sectarian, *in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler*

of the world are known to differ (for example, the divinity of Christ).") (emphasis added) (citation omitted); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) ("While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious . . . no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.").

Because the cross is sectarian and specifies the divinity of Christ, its continuing designation as a national memorial renders the mere privatization of the land upon which it sits an insufficient remedy for the Establishment Clause violation adjudicated in *Buono I*. Regardless of who owns the land on which the cross sits, its continuing designation as a national memorial excludes the contribution and sacrifice of hundreds of thousands of non-Christian World War I veterans and their families.[26] Indeed, the court of appeals concluded that the war memorial designation might lead "observers to believe that the [government] ha[d] chosen to honor only Christian veterans." Pet. App. 110a n.5 (quoting *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring)).[27]

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[26] For example, about 250,000 Jews served in the United States Army in World War I, and approximately 3,500 were killed in action or died of wounds. *See* Jewish-American History and Culture: An Encyclopedia, at 397 (Garland Publishing 1992).

[27] If this Court affirms the judgment in *Buono II*, Petitioners will be required to abide by *Buono I*'s permanent injunction. If Petitioners chose to comply with the injunction by removing the cross from Sunrise Rock and giving it to either the VFW or the

Petitioners present no credible defense of how the continuing designation of the cross as a national memorial is consistent with a valid remedy of the constitutional violation. Petitioners claim that when a display is on private land, observers will *generally* attribute that display to the private owner. But in none of the cases that Petitioners cite for this proposition, Pet. Br. at 23-25 & n.3, had a government designated the privately-owned symbol at issue to be a public memorial. When the government has done so, as here it has designated the Christian cross a national memorial, observers will surely presume that the symbol expresses the government's message.

Petitioners also contend that "if the Constitution permits the government to *display* a longstanding memorial with a predominantly secular message . . . *a fortiori* it permits the government to *transfer* such a memorial to a bona fide private recipient." Pet. Br. at 29 (citing *Van Orden*, 545 U.S. at 691-92 (plurality); *id.* at 603-04 (Breyer, J., concurring in the judgment)). This syllogism fails. To hold that the government may transfer something it is *permitted to display* says absolutely nothing about whether the government remedies a constitutional violation by transfering something *it has been ordered not to display*, such as the sectarian religious symbol held to be unconstitutional in *Buono I*.

Sandozes, that action would essentially nullify the designation of the cross as a national memorial because the designation applies only to the cross at Sunrise Rock. *See* Pub. L. No. 107-117, § 8137(a),(b).

2. *Petitioners Maintain A Reversionary Interest In, And Continued Supervisory Duties Over, The Land On Which The Cross Is Located*

Petitioners' core argument concerning the land transfer is that reasonable observers will presume that a religious monument reflects the views of the owner of the property. Thus, they argue, if the land on which the cross is located is owned by the VFW, the constitutional violation adjudicated in *Buono I* will end. Pet. Br. 21-23. This argument is unavailing. Because a number of statutory provisions will have the effect of continuing the government's association with the cross, the land transfer will not result in the cross' reflecting only the message of a private party.

First, Section 8121 includes a reversionary clause providing that if the VFW fails to maintain the land as a memorial to American veterans of World War I, it will revert to the government. The reversionary clause leaves an important part of ownership of the property in the government's hands. As the court of appeals noted, it is well-established that reversionary clauses in government land transfer provisions constitute a form of continuing government control over the property. Pet. App. 80a (citing cases). These cases conform with the basic legal tenet that a reversionary interest is an ownership interest in real property. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 (1983).

Moreover, the reversionary clause is directly tied to Petitioners' conceded interest in ensuring that

the sectarian religious symbol at the heart of this case remain in place at Sunrise Rock.[28] This is so because the reversionary clause will likely influence the VFW's decision about how it uses its property; for if the VFW takes the cross down, that action will raise the question of whether the land is being maintained as a war memorial. The VFW can most easily avoid this question simply by maintaining the cross. By contrast, the reversionary clause in *Marshfield* was entirely unrelated to the religious symbol on the land that was transferred. *Marshfield*, 203 F.3d at 490 (deed contained a covenant running with land transferred to private party, the only effect of which was to restrict use of the parcel to public park purposes). And in *Mercier*, the government did not retain any future interest in the transfered land. 395 F.3d at 705.

Petitioners' attempts to diminish the significance of the government's continuing ownership interest in the land on which the cross is located are unsuccessful. It is of no moment here that "reversionary clauses are common in land transfers." Pet. Br. 43. Common or not, this clause, which relates to the maintenance of the symbol, stands in the way of the complete transfer of ownership that is necessary in this case to a remedy that "so far as possible" cures the violation. *United States v. Virginia*, 518 U.S. at 547.[29] Nor is it

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[28] *See* Section II(A)(4), *infra*.

[29] An issue posed by *Marshfield* – whether a reversionary clause that is *unrelated* to the display that has been held to violate the Constitution would be permissible – is not posed by the facts of this case.

important whether the reversionary interest constitutes state action. Pet. Br. 42-43. It is enough that the clause constitutes an ownership interest in the property relating directly to the unconstitutional display and influences the VFW's actions.

A second federal statute, 18 U.S.C. §1369,[30] also belies the argument that the transfer will disassociate the government from the cross. That statute makes it a federal crime to harm or destroy a war memorial on land that is under the jurisdiction of the federal government.[31] Thus, the federal

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[30] 18 U.S.C. §1369 states:

> (a) Whoever, in a circumstance described in subsection (b), willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) A circumstance described in this subsection is that - (1) in committing the offense described in subsection (a), the defendant travels or causes another to travel in interstate or foreign commerce, or uses the mail or an instrumentality of interstate or foreign commerce; or (2) the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government.

[31] Given the cross's designation as a national memorial by Congress, and the fact that the land on which the cross is located is within the boundaries of the Mojave Preserve, the cross remains "under the jurisdiction of the federal government" for purposes of Section 1369. *See* 16 U.S.C. §§ 410aaa-42, 410aaa-43 (providing for the transfer of approximately 1.4 million acres in the boundary of the Mojave National Preserve from the BLM to the "administrative jurisdiction" of the Director of the NPS). Land within the boundary of the Preserve includes privately owned land. *See* 16 U.S.C. § 410aaa-56

government is committed to policing the display even it were owned by the VFW. Moreover, this statute arguably prevents the VFW from dismantling the display lest it be accused of destroying a war memorial. While courts may generally impute expression on private land to its private owner, that understanding would not hold where the private owner is likely *required* by federal law to maintain the expression.

Petitioners contend that 18 U.S.C. § 1369(b) does not bar the VFW from removing the cross because "[t]he Park Service will be able to regulate Sunrise Rock only insofar as activities on those inholdings affect the purposes of federally owned lands." Pet. Br. 42. They defend this narrow reading of the relevant statutes on the grounds that such a saving construction helps avoid "casting constitutional doubt on Congress's transfer the land." Pet. Br. at 42 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). While Petitioners are correct that the obvious reading of the statutory framework does raise constutional concern (specifically, that reading undermines the contention that the land transfer remedies the constitutional violation), they are incorrect that a saving construction is available here. *See Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998)

(permitting the Secretary to acquire privately owned lands "within the boundary of the [Mojave National P]reserve"); *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983) (observing that the phrase "within the boundaries" of the Ozark National Scenic Riverways "incorporate[s] federal, state, and private land, and . . . makes no distinctions on the basis of ownership").

(saving construction of a statute only available if reasonable). There is no reasonable interpretation of §1369(b) that would exclude from its scope war memorials located on land that is within the "adminstative jurisdiction" of a federal agency. Any interpretation that limited the scope of 18 U.S.C. § 1369(b)(2) to land owned by the federal government would violate a basic rule of statutory interpretation by nullifying the phrase "under the jurisdiction of the federal government." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted).

Third, wholly apart from the reversionary clause and 18 U.S.C. § 1369, a set of statutory provisions provide that the NPS necessarily will continue to exercise regulatory and supervisory duties over the land on which the cross is located because the cross is to remain a national memorial post-transfer and the land is within the boundaries of the Mojave National Preserve. For example, Title 16 U.S.C. § 1 provides that NPS "shall promote and regulate the use of Federal areas known as national parks, monuments, and reservations . . ." National memorials were explicitly included within the definition of the national park system in 67 Stat. 496 (1953) and thus under the NPS' regulatory authority. That regulatory authority was maintained in Pub. L. 91-383, § 2(a) (1970), now codified in 16 U.S.C. § 1(c). The director of the NPS also has "the supervision, management, and control" over the memorial under 16 U.S.C. § 2. Furthermore, the land transferred by Section 8121 will remain within the boundaries of the Preserve, and thus under the jurisdiction of the

NPS. *See* 16 U.S.C. §§ 410aaa-42 and 410aaa-43; 16 U.S.C. § 2. *See also* 16 U.S.C. § 1; Pet. App. 78a-79a.

The government exercised no such regulatory authority or "supervision, management, and control" following the land transfers in *Marshfield* or *Mercier*. Indeed, a prime example offered by the Seventh Circuit of "unusual circumstances" that would raise a fact-specific question about whether a land transfer cured an Establishment Clause violation was a sale that "left the [government] with continuing power to exercise the duties of ownership." *Mercier*, 395 F.3d at 702. And in *Marshfield*, it was precisely the government's cessation of ownership duties over the land on which the religious symbol rested that led the Seventh Circuit to conclude that the transfer did not violate the Establishment Clause. *Marshfield*, 203 F.3d at 493.

Petitioners' only response to the NPS' onging statutory management and supervision duties over the cross is unpersuasive. Petitioners state that the designation as a national memorial "has no legal significance [because] [s]uch a declaration standing alone does not transfer any regulatory authority over private property to the federal government." Pet. Br. 41. However, 16 U.S.C. § 1, provides that NPS "shall promote and regulate the use of Federal *areas* known as national parks, monuments, and reservations. . . ." *Id.* (emphasis added).[32] In other words, national

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[32] Petitioners did not contest below, or in their Petition to this Court, that the NPS' duties with respect to national monuments applied also to national memorials. They argued only that the NPS' duties of "supervision, management, and control" applied to national memorials on federal land, not private land. Pet. 27.

monuments are "Federal areas" under 16 U.S.C. Section 1, regardless of whether they are on federal or private land.[33] If Congress had wanted to limit the NPS' jurisdiction to national monuments or memorials on federal lands, it could have done so, as it has done in other statutes. *Compare* 7 U.S.C. § 2814 (requiring federal agencies to "develop and coordinate an undesirable plants management program for control of undesirable plants on Federal lands under the agency's jurisdiction."). Under statutory construction principles, Congress's failure to use the term "federal lands" in 16 U.S.C. § 1 means that the provision should be interpreted to extend to "federal areas" that are not located on "federal land." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 & n.2 (1987) (discussing statutory construction implications of Congress's use of a term in one statute that it failed to use in a second statute).

Thus, the land transfer does not fully remedy the constitutional violation because of the numerous ways Petitioners will continue to have an ownership interest in, and control over, the Christian cross and the land on which it is located.

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[33] Other provisions of federal law also demonstrate that national monuments may be located on private land. For example, 16 U.S.C. § 431 provides that the President may designate national monuments and that "when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract . . . *may be* relinquished to the government." (emphasis added). If the tract on which the national monument rests is not relinquished to the government (and it does not have to be under Section 431), then the tract would remain in private hands, notwithstanding the presence of a national monument on it.

3. *The Structure Of The Transfer Perpetuates The Government's Longstanding Favoritism Towards The Cross*

Section 8121's method of transfer underscores that the statute is an insufficient remedy to the Establishment Clause violation. A valid remedy responds to the specific nature of the violation. *See Milliken*, 418 U.S. at 744. The government's favoritism for Mr. Sandoz and the sectarian religious symbol he erected on public land, and its exclusion of another private party who wanted to erect a different religious symbol, were principal reasons for the court of appeals' Establishment Clause holding. Pet. App. 112a-113a. Accordingly, eliminating that favoritism and exclusion "so far as possible" is essential to a valid remedy. *United States v. Virginia*, 518 U.S. at 547. Here, the method of transfer perpetuates this favoritism and exclusion by permitting only the Sandozes and the VFW to participate in the transfer of the land on which the sectarian religious symbol rests.

Section 8121's perpetuation of favoritism and exclusion is manifested in the unusual method of transfer that Congress employed in the statute, a method of transfer that bypassed the normal statutory channels. Specifically, there is a general land transfer statute that provides for the Secretary of Interior to exchange federal land for non-federal land. Petitioners did not use it. There is a second statute that addresses land exchanges within the Preserve. Petitioners did not use it either. Pet. App. 81a-82a (citing statutory provisions governing land

exchanges by the Secretary of Interior and in the Mojave Preserve). Instead, Congress enacted a special provision in an appropriations bill, essentially a private bill benefitting a particular association (the VFW) and particular individuals (the Sandozes).

This circumvention of the ordinary channels for transferring land implicates the concern for sectarian favoritism that this Court warned about in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). In *Kiryas Joel*, this Court held that New York violated the Establishment Clause when it devised, through a special Act of the legislature" rather than through the "State's general laws," a school district whose boundaries were coextensive with the boundaries of a devoutly religious village. *Id.* at 700-01. The Court grounded its decision in the abnormal circumstances surrounding the creation of the district, which raised concerns that the state had not, and would not, exercise its school district reorganization "authority in a religiously neutral way," as the Establishment Clause requires. *Id.* at 703. Here, too, the abnormal circumstances surrounding the method of land transfer further undermines the remedial legitimacy of Section 8121.

Petitioners respond that selling the land to the VFW is permissible because the VFW has a longstanding relationship with the memorial and is the "logical purchaser." Pet. Br. at 46 (quoting *Mercier*, 395 F.3d at 705). But the transfer statute was meant to remedy a constitutional violation based in part on unconstitutional favoritism toward the symbol originally erected by this very group, and so a transfer specially directed to this group does not

remedy the Establishment Clause problem. It would be logical for the government to return the cross to the VFW or the Sandozes. But it is not logical for the government to sell a parcel of government-owned land in a National Preserve to the VFW just because the cross is on it, particularly since neither the VFW or the Sandozes ever owned the land on which the cross sits. J.A. 71; R. App. 3a.

Where a constitutional violation is based in part on impermissible favoritism, eliminating that favoritism as much as possible so that the parties return to the situation they would have been in absent the favoritism is essential to a proper remedy. *See United States v. Virginia*, 518 U.S. at 547. To satisfy that standard here, the government would either have to keep the land and return the cross to the VFW or the Sandozes, or sell the land according to its usual processes or in some other neutral fashion.

4. *The Conceded Purpose Of Section 8121, And The History Of Other Relevant Statutes, Demonstrate That The Transfer Was Designed To Ensure That The Christian Cross Remained In The Very Same Location On Sunrise Rock*

The final judgment in *Buono I* permanently enjoins the Petitioners from displaying the Christian cross on Sunrise Rock. Petitioners concede that one of the primary purposes of Section 8121 is to ensure that the Christian cross will continue to be displayed at Sunrise Rock. Pet. Br. 28. While they state that Congress' intent was to preserve "a longstanding war

memorial," *id.*, that war memorial *is* the cross. Pub. L. 107-117, § 8137(a) (designating cross in Mojave Preserve as a national memorial to World War I veterans).

The structure of the transfer and the government's previous efforts to preserve the cross are all consistent with the government's conceded purpose of ensuring the cross remains displayed at Sunrise Rock, albeit on land that would be primarily owned by the VFW. For example, Section 8121 provides for the Sandozes to give land to the government in exchange for the government's giving the land on which the cross is located to the VFW. Because Mr. Sandoz erected the current cross and has stated both his unwillingness to take the cross down and his commitment to putting it back up if the NPS took it down, Pet. App. 120a, his linchpin role in the transfer makes clear that Congress structured the transfer to ensure that the cross remains standing in its current location. Indeed, Petitioners concede that the transaction is structured to increase the likelihood that the cross will remain in place, and the VFW has declared that it intends to maintain the cross "in perpetuity." Pet. Br. 28, 48; VFW Reply On Motion to Intervene at 3.

In addition, Congress twice forbade the NPS from spending any funds to take the cross down, once after the initial letter on behalf of Respondent to the NPS, and again *after* the district court had already entered its 2002 judgment encompassing the permanent injunction. Public Law 107-248, § 8065(b) states: "[n]one of the funds in this or any other Act may be used to dismantle *national memorials* commemorating United States participation in World War I." (emphasis added).

Petitioners claim that the purpose of that provision was to prevent the destruction of *other* World War I memorials on federal land. Pet. Br. 38. There are, however, no other *national memorials* commemorating United States participation in World War I on federal land, other than the Christian cross at issue here. *See* 16 USC § 431 note. In other words, the sole purpose and effect of that congressional act was to prevent the NPS from taking steps to obey the district court's injunction.

If the principal effect of displaying a Christian cross on government property is impermissibly to advance a sectarian religious message, then a series of government acts, including the land transfer provision, that have the purpose and effect of ensuring that the *same* sectarian display remains standing in the *same* location with ongoing government involvement and endorsement constitutes an insufficient remedy to the adjudicated violation. Petitioners' position is that so long as the eventual owner of the religious symbol is not the government, there is no constitutional problem with the government's structuring the transaction to ensure an entity committed to keeping the symbol up is selected; were the Court to endorse this position, it "would tempt [] public bod[ies] to contract out [their] establishment of the religious, by encouraging the private enterprise of religion to exhibit what the government could not itself display." *Pinette*, 515 U.S. at 792 (Souter, J., concurring in part and concurring in the judgment). Petitioners' position also is inconsistent with longstanding precedent. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (plurality opinion) (government may not use private parties to accomplish what it is

forbidden to achieve); *accord*, *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

B. The Land Transfer Statute Was Properly Enjoined Because It Will Interfere With Both Petitioners' Ability To Effectuate A Complete Remedy And The District Courts' Power To Enforce Its Judgment

As explained above, the land transfer is an incomplete remedy to the adjudicated constitutional violation. Not only does the land transfer fail to remedy the Establishment Clause violation, however, but permitting it to go into effect would actually prevent Petitioners from remedying the violation. Specifically, if the NPS no longer has the current ownership interest in the land, then neither it nor Congress can arrange for a neutral sale. In addition, if the transfer were effectuated, it would interfere with the district court's inherent authority to enforce its judgment. *See Hutto*, 437 U.S. at 690. As a result, the lower courts acted well within their discretion in enjoining the transfer.

Petitioners are incorrect in arguing that, upon concluding that Section 8121 is an insufficient remedy, the court of appeals should have remanded with instructions that the district court order Petitioners to place disclaimers and fencing at Sunrise Rock, instead of enjoining the transfer. Pet. Br. 51-52 (citing *Marshfield*, 203 F.3d at 495, 497). In this case, only a netural transfer to a private party can undo the favoritism that was a core component of the court of appeals' final judgment. *See* Section II(A)(3), *supra*. Even were disclaimers and fencing posted at Sunrise Rock, the

unconstitutional favoritism would linger as a result of Section 8121's method of transfer.

Finally, Petitioners contend that the court of appeals had no authority to evaluate whether Section 8121 remedies the Establishment Clause violation and enjoin the transfer because judges may not "divest Congress of its 'authority to alter the prospective effect of previously entered injunctions." Pet. Br. 30 (quoting *Miller v. French*, 530 U.S. 327, 344 (2000)). Petitioners are wrong because the principle on which they rely is inapposite.

The principle applies in the specific circumstance when Congress changes the legal basis on which a previously entered injunction rests. For example, *Miller* addressed the Prison Litigation Reform Act of 1995 ("PLRA"), which had the effect of altering the legal basis -- namely, 42 U.S.C. § 1983 -- for previously entered injunctions in prison conditions cases by setting new standards for the continuation of such injunctions. 530 U.S. at 333-34. *Miller* has no bearing here for two reasons. *First*, Section 8121 does not change the legal rule on which the injunction in this case rests. Unlike the PLRA, Section 8121 does not establish a new standard by which the district court is to evaluate whether the injunction should continue in effect. *See also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (Congress could alter effect of previous injunction against bridge, granted because it was an unlawful obstruction under old congressional statute, by new law declaring the bridge a lawful structure). Indeed, Petitioners do not claim otherwise. They merely assert that Section 8121 is an adequate remedy for the already adjudicated constitutional violation. *See, e.g.*, Pet.

Br. 21.

Second, the principle applied in *Miller* does not speak to the authority of a court to evalute whether an Act of Congress remedies a previously adjudicated constitutional violation and enjoin that statute if the court concludes that it is an invalid remedy that would interfere with the effectuation of a valid remedy. Unlike Section 8121, which Petitioners claim remedies the Establishment Clause violation adjudicated in *Buono I*, the PLRA was not justified in *Miller* as a remedy for constitutional violations.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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Dated: July 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK BUONO; et al.,

Plaintiffs-Appellees,

v.

GAIL NORTON, Secretary of the Interior, in her official capacity; et al.,

Defendants-Appellants.

No. 03-55032

D.C. No. CV-01-00216-RT

JUDGMENT

Appeal from the United States District Court for the Central District of California, Riverside.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Riverside and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Monday, June 07, 2004

COSTS TAXED

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FRANK BUONO; ALLEN SCHWARTZ,)
Plaintiffs,) Case No. EDVC
vs.) 01-216-RT (SGLx)
GALE NORTON, Secretary of the Interior, in her official capacity; JOHN J. REYNOLDS, Regional Director, Pacific West Region of the Department of Interior, in his official capacity; MARY MARTIN, Superintendent of the Mojave National Preserve, in her official capacity,)
Defendants.)

COPY

DEPOSITION OF FRANK BUONO

Taken in behalf of the Defendants

December 27, 2001

step, which was to transition them – give them six months breathing time, a diminutive time in which to produce and propose new plans.

Q Does the Park Service also have the ability to work out some arrangement to work with local citizens concerning the issue of the cross, and see if some time period can be worked out before the cross is removed?

A The case of mining claims is readily distinguishable. The mining claims were valid, existing rights established pursuant to federal law. The cross, on the other hand, was placed by citizens without any approval or authority that we know of, in trespass on federal land.

Q Well, you don't really know when the cross was first erected then?

A Except we do know that lands have been federal since 1848. And I don't think it predates that.

Q Are you familiar with the BLM procedures for permitting on BLM lands?

A Vaguely.

Q And you can say with confidence there was no authorization or permit issued with respect to the erection of the cross?

REPLY BRIEF

08-472

Supreme Court, U.S.
FILED
AUG 26 2009
OFFICE OF THE CLERK

No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 08-472

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

I. RESPONDENT'S STANDING IS PROPERLY BEFORE THIS COURT

For the first time, respondent advances (Br. 11-18) the proposition that this Court cannot consider his standing to sue, because the United States is collaterally attacking the initial proceeding in *Buono* v. *Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), aff'd, 371 F.3d 543 (9th Cir. 2004) (*Buono I*). That argument is incorrect, no matter how one characterizes the successive proceeding in *Buono* v. *Norton*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), aff'd, 527 F.3d 758 (9th Cir. 2008) (*Buono II*). The correct characterization is that *Buono I* and *II* are successive stages of the same civil action, and thus this Court may consider questions determined in *Buono I*, including whether respondent had standing to challenge the display of the memorial and obtain an

injunction. Nevertheless, even assuming that *Buono II* were a new civil action, respondent still would have to demonstrate that he presently possesses standing to challenge the transfer of the memorial. And, finally, even if *Buono II* were an enforcement action, and the government's challenge to respondent's standing were a collateral attack on the earlier judgment, respondent has waived any objection based on issue preclusion—and preclusion would not even apply on the facts of this case.

A. The Proceedings In *Buono I* And *II* Are Part Of The Same Civil Action, And Thus This Court May Consider Respondent's Standing To Challenge The Display

1. Both of the proceedings—in *Buono I* and *II*—are part of the same civil action. In *Buono I*, after oral argument before the court of appeals, Congress enacted the 2004 Act, transferring Sunrise Rock to Post 385E of the Veterans of Foreign Wars (VFW). The court of appeals then ordered supplemental briefing on the effect of the 2004 Act. The government argued that Congress's decision to transfer the land rendered moot the question of whether the government's display of the cross violated the Establishment Clause. See 03-55032 Docket entry No. 41 (9th Cir. Dec. 12, 2003). Respondent argued not only that the case continued to present a live controversy, but also that the land transfer should be enjoined because it violated the Establishment Clause. See *id.* No. 48 (Dec. 31, 2003). In its decision in *Buono I*, the court of appeals held that the case was not moot. Pet. App. 102a-103a. It expressly declined to address, however, "whether a transfer completed under [S]ection 8121 [of the 2004 Act] would pass constitutional muster, * * * leav[ing] this question for another day." *Id.* at 104a.

Respondent proceeded to litigate that question in the district court before the same judge and under the same docket number. Respondent filed a motion to enforce or modify his existing injunction, and requested the same relief that he had previously requested from the court of appeals: a permanent injunction to prevent the government from implementing the 2004 Act. In those circumstances—where the court of appeals declines to address an argument that the party proceeds to raise in the district court, before the same judge and under the same docket number, as grounds for additional relief—the proceedings are most reasonably viewed as different stages of the same litigation.[1]

2. According to respondent (Br. 11-12), if the government wanted this Court to review his standing to challenge the display, it had to petition for a writ of certiorari to *Buono I*. But that was entirely unnecessary at the time. The government had no reason to ask this Court to evaluate respondent's standing to bring this lawsuit once Congress acted to require transfer of the memorial to a private party. The question of respondent's standing would have made no difference to the government had the lower courts allowed the transfer to take place—which is why the government litigated below the constitutionality of the transfer before seeking this Court's review of the standing question.

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[1] Contrary to respondent's assertion (Br. 12, 14-16), the present case is different from both *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923), and *Travelers Indemnity Co.* v. *Bailey*, 129 S. Ct. 2195 (2009). In each of those cases, the parties litigated to a judgment whose finality was undisputed, and then one of the parties brought collateral proceedings designed to undermine the earlier judgment. Here, the very question at issue is whether *Buono I* was a final judgment for preclusion purposes—a question that neither *Toledo Scale* nor *Travelers* had occasion to address.

Nor is respondent correct (Br. 12) that the government is time-barred under 28 U.S.C. 2101(c) by its failure to petition for review in *Buono I*. The government timely petitioned for review in *Buono II*. The question, once again, is whether *Buono I* and *II* are successive stages of the same civil action. Because they are, this Court's grant of certiorari exposed the entire case to review. See, *e.g.*, *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). As the Court has explained, "[it has] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). The Court therefore has authority to consider questions determined in *Buono I*, including whether respondent had standing to challenge the display and obtain an injunction.

B. Even If *Buono II* Is A Separate Civil Action, This Court Must Consider Respondent's Standing To Challenge The Transfer

1. Alternatively, if *Buono II* is a separate civil action, this Court still is required to consider whether respondent presently possesses standing. That is because *Buono II*, if not just the second part of a single action, should be viewed as an entirely new civil action, not simply an enforcement proceeding. Contrary to respondent's assertion (Br. 29-33), the courts below did not merely enforce the earlier injunction. By its terms, that injunction said nothing about transferring the cross. It provided that the government was "permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." Pet. App. 146a. Indeed, the district court could not possibly have addressed in *Buono I*

the propriety of transfer, because, at the time that the injunction was entered, Congress had yet to pass the 2004 Act.

To be sure, when respondent returned to the district court in *Buono II*, he styled his filing as a motion to enforce or modify his existing injunction. Pet. App. 86a. But respondent could not have been seeking enforcement. It is undisputed that, from *Buono I* to the present day, the government has not "permitt[ed] the display of the Latin cross in the area of Sunrise Rock." *Id.* at 146a. The government has complied with the terms of the injunction since it was entered. That is why respondent did not request, and could not have requested, an order to show cause why the government should not be held in contempt for violating the injunction. It is also why respondent requested in the alternative the relief that he actually desired: modification of his injunction.

That is the relief that the district court effectively ordered. It concluded "that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 97a. It therefore broadened the terms of the injunction to "permanently enjoin[]" the government "from implementing the provisions of Section 8121 of Public Law 108-87." *Id.* at 99a. Although the district court stated that it was enforcing the injunction, *id.* at 98a, in fact it modified the injunction to include an additional form of relief: a permanent prohibition on transfer of the memorial pursuant to the 2004 Act.

2. Respondent bears the burden of demonstrating that he has standing to seek that additional form of relief. See *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) ("[A plaintiff] bears the burden of showing that he has standing for each type of relief sought."); see also *Lewis* v.

Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). To obtain an injunction against the transfer, respondent must show that the transfer has caused him to suffer a legally cognizable injury.

Respondent therefore cannot evade his present obligation to demonstrate standing. "[I]t is well established that the [C]ourt has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers*, 129 S. Ct. at 1152; see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). Nor has respondent's standing to contest the transfer of the memorial gone unchallenged by the government. The government has claimed that respondent lacks such standing—even if not in the most precise way, given the government's basic view that *Buono I* and *II* are parts of the same civil action.[2] And whether respondent has such standing is fairly included in the question presented of "[w]hether respondent has standing to maintain *this action*." Pet. I (emphasis added); see Sup. Ct. R. 14(a); Eugene Gressman et al., *Supreme Court Practice* § 6.25(g), at 457 (9th ed. 2007). Simply put, whether *Buono I* and *II* are the same action or separate ones, respondent cannot avoid his burden to demonstrate that he has standing to enjoin either the display or the transfer of the memorial at Sunrise Rock.

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[2] See Pet. 13 ("[R]espondent has disclaimed any spiritual injury stemming from the display or transfer of the cross."); see also Pet. Br. 9 ("Respondent lacks standing under the Establishment Clause to challenge Congress's land transfer."); *id.* at 14 (arguing that "respondent's statements * * * disclaim standing to challenge the transfer").

C. Even If The Government Is Collaterally Attacking *Buono I*, This Court Can And Should Consider Respondent's Standing To Challenge The Display

1. Finally, even if respondent were correct that *Buono II* is a mere enforcement action, that still would not help him. Respondent argues (Br. 13-18) that the government cannot relitigate the issue of whether he has standing to challenge the display in such an action. But respondent has waived this argument. Issue preclusion is not jurisdictional, and may therefore be waived. See 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4405, at 83-84 (2d ed. 2002) (*Wright*) ("[A] party entitled to demand preclusion is also entitled to waive it."); *id.* at 100 ("[T]here is no right to raise preclusion for the first time on appeal.").[3] Although the government presented in its petition (at I, 12-16) the question of respondent's standing to challenge the display, respondent concedes (Br. 16 n.14) that he did not raise issue preclusion in his brief in opposition. Because respondent did not timely raise issue preclusion, he has waived it. See Sup. Ct. R. 15.2; *Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998) (finding that respondent had waived an issue preclusion argument not raised in its brief in opposition).[4]

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[3] Respondent claims that his "res judicata argument * * * is jurisdictional," because "it refutes [p]etitioners' assertion that [r]espondent lacked standing, which is an attack on jurisdiction in *Buono I*." Br. 17 n.14. Respondent cites nothing in support of the proposition that issue preclusion becomes jurisdictional whenever the underlying issue sought to be precluded—here, standing—is itself jurisdictional. Nor could he. Just as a party may assert preclusion of a previously litigated jurisdictional issue, *Durfee* v. *Duke*, 375 U.S. 106, 112 (1963), so too a party may waive such preclusion by failing to timely raise it.

[4] Respondent also claims (Br. 17 n.14) that his issue preclusion argument does not fall within Supreme Court Rule 15 because it is not

2. Even putting waiver aside, respondent's preclusion argument should be rejected. The general rule in favor of affording preclusive effect to a prior judgment is outweighed by competing considerations in the context of this case. See 13D *Wright* § 3536, at 11 (3d ed. 2008). As relevant here, issue preclusion does not apply when "[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest * * *, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of * * * special circumstances, did not have adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5) (1982) (Restatement).

Although any of those conditions would suffice to overcome preclusion, all are present here. As an initial matter, Congress's passage of the 2004 Act altered the "potential adverse impact" of the standing decision in *Buono I* "on the public interest." See 18 *Wright* § 4424, at 641 (2d ed. 2002). Not a mere use of public land, but the validity of a federal statute, now depends in part on that decision. Moreover, as described above, Congress's passage of the 2004 Act elimi-

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"based on what occurred in the proceedings below." Sup. Ct. R. 15.2. If that were correct, no respondent would ever need to raise any form of preclusion in a brief in opposition, because by definition claim and issue preclusion concern the preclusive effect of previous litigation. In any event, Rule 15's use of the phrase "the proceedings below" reasonably means the entirety of the proceedings between the parties in the same or a related civil action. Interpreting the phrase more narrowly would defeat the Rule's purpose: to ensure that a brief in opposition "address[es] any perceived misstatement of fact or law in the petition *that bears on what issues properly would be before the Court* if certiorari were granted." *Ibid.* (emphasis added).

nated any need or reason for the government to seek this Court's review of *Buono I*; and the government could not reasonably foresee that the lower courts would interpret the injunction issued in *Buono I* to require invalidation of the 2004 Act. See pp. 4-5, *supra*. In those circumstances, affording preclusive effect to the standing decision in *Buono I* would work an injustice and disserve the public interest. See 18 *Wright* § 4426, at 683 (2d. ed. 2002).[5] Accordingly, this Court can and should reach the question of whether respondent has standing.

II. RESPONDENT LACKS STANDING UNDER THE ESTABLISHMENT CLAUSE

A. Respondent Lacks Constitutional Standing Because He Lacks The Requisite Personal Injury

1. Respondent acknowledges (Br. 21-22) before this Court, as he did before the lower courts, that he has no objection to religious symbols or imagery on private property. Rather, respondent objects to the display of a religious symbol on public property. J.A. 50. That should be the beginning and end of the standing analysis, because the government has eliminated the basis for respondent's objection by transferring the land on which the cross sits to a private party. It is no answer for respondent to say (Br. 31 n.21) that his "statement was made years before Congress' enactment of Section 8121." In electing to continue an existing civil action rather than to commence a new one, see pp. 2-3, *supra*, respondent elected to stand on an injury that is no longer attributable to the government.

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[5] For the same reasons, preclusion should be denied because "[t]he issue is one of law and * * * a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." Restatement § 28(2)(b).

Respondent contends, however, that Congress has not eliminated the basis for his objection because "the federal government will continue to retain significant interests in the land and the symbol, thereby failing to fully 'privatize' the cross." Br. 31. According to respondent, "[t]his objection to the transfer articulates an injury in fact for standing purposes." *Ibid.* If that is respondent's theory, his alleged injury in fact has not changed at all from *Buono I* to *Buono II*: it remains the absence of an open forum on land that, according to respondent, is under government control. And in that case, he lacks standing to challenge the transfer for the same reasons—both constitutional and prudential—that the government previously argued he lacked standing to challenge the display.

2. Respondent claims, as to the constitutional part of that analysis, that "the touchstone of Article III standing is direct and unwelcome contact with government action that is alleged to be impermissibly religious in nature." Br. 19. Respondent misses the key question, however, which is *why* such contact is unwelcome. In the cases on which respondent relies (Br. 19, 24-25), the contact with government action gave rise to standing either because it coerced the plaintiffs to observe a religious orthodoxy, violated their religious or spiritual beliefs, or caused them to feel like outsiders to the community.

In *School District* v. *Schempp*, 374 U.S. 203 (1963), for instance, schoolchildren were subjected to Biblical readings "which were contrary to the religious beliefs which they held and to their familial teaching." *Id.* at 208 (quoting *Schempp* v. *School Dist.*, 177 F. Supp. 398, 400 (E.D. Pa. 1959)). And in *Lee* v. *Weisman*, 505 U.S. 577 (1992), a middle school student was "being forced by the State to pray in a manner her conscience [would] not allow." *Id.* at 593. No party questioned, and the Court did not address, standing

in those cases, because the schoolchildren at issue had been coerced to observe a religious orthodoxy that ran counter to their own beliefs.[6]

Respondent does not present that sort of injury. Indeed, he has expressly disclaimed any personal injury—including direct or indirect coercion, impingement on religious beliefs, or feelings of exclusion—from observation of the cross itself. What injures respondent is not the presence of the cross but the absence of other symbols atop Sunrise Rock. Or, more precisely, what injures respondent (because no one knows if anyone currently wishes to place other symbols in this desolate spot) is the abstract knowledge that other symbols may not be displayed atop Sunrise Rock. But this alleged injury is nothing more than contact with a governmental action that violates respondent's constitutional (as opposed to religious) views. He cannot point to any decision of this Court holding that such contact gives rise to standing under the Establishment Clause.[7]

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[6] Respondent also relies (Br. 20, 25) on this Court's decisions in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and *McCreary County* v. *ACLU*, 545 U.S. 844 (2005). None of those cases addresses standing. See, *e.g.*, *Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings of this sort * * * have no precedential effect."). But as far as the records reveal, plaintiffs in those cases objected to governmental displays that violated their own religious beliefs. See *ACLU* v. *McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) (holding that an organization's members had standing because the displays were "a serious insu[l]t to [their] religious sensibilities"); ACLU Br. 7, *Allegheny* (No. 87-2050) (stating that plaintiffs included "a Unitarian minister" and "a Moslem whose religion views tangible depictions of the deity as a profanity").

[7] Respondent falls back on lower court decisions that he says support his test for standing. But in some of those decisions, it is not clear whether the government actions at issue violated the plaintiffs' religious beliefs. See *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990); *Hawley* v. *City of Cleveland*,

3. Indeed, respondent's approach is irreconcilable with *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (*Valley Forge*). In that case, plaintiffs sought to challenge a transfer of public land in Pennsylvania to a religiously-affiliated private institution. *Id.* at 468. The Court held that the plaintiffs lacked standing, because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Court took pains to explain that "abstract injury in nonobservance of the Constitution" or mere disagreement "phrased in constitutional terms" does not constitute a cognizable injury under the Establishment Clause. *Id.* at 482, 485-486 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974)).

Respondent contends that the plaintiffs in *Valley Forge* lacked standing because, as residents of Maryland and Virginia, they lacked "any direct contact with the action." Br. 22. The Court, however, expressly rejected that view. It noted that one of the plaintiff-organizations "claims that it has certain unidentified members who reside in Pennsylvania." *Valley Forge*, 454 U.S. at 487 n.23. The Court deemed that fact irrelevant: "[Plaintiff] does not explain * * * how this fact establishes a cognizable injury where none existed before. [Plaintiff] is still obligated to allege facts sufficient to establish that one or more of its members

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773 F.2d 736 (6th Cir. 1985), cert. denied, 475 U.S. 1047 (1986). Even assuming, however, that they did not, the government recognized in its petition (at 16-18) that the courts of appeals have not taken a uniform approach to the concept of injury for standing purposes in Establishment Clause cases. To the extent lower courts require nothing more than contact with a governmental action allegedly violating the Establishment Clause, those courts have misconstrued *Valley Forge*.

has suffered, or is threatened with, *an injury other than their belief that the transfer violated the Constitution.*" *Ibid.* (emphasis added). *Valley Forge* thus makes plain that "unwelcome direct contact with a religious symbol that sits on government property" does not suffice to confer standing, Resp. Br. 20, if the contact is unwelcome only because it conflicts with the plaintiff's views of the Establishment Clause.[8]

A contrary rule would permit a plaintiff who suffers only this kind of harm—a belief that governmental action violates the Constitution—to bootstrap himself into standing simply by making sure to subject himself to the display or practice. And that rule would ignore the essence of respondent's complaint, which alleges injury from contact with the display only because he believes that it violates the Constitution. In the end, respondent's injury is no different from that of others who are aware of this litigation and share his view of the Establishment Clause: the harm that flows from the government's taking action to which one objects on constitutional grounds.[9]

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[8] Contrary to respondent's assertion (Br. 23-24), the government does not draw any distinction for standing purposes between exposure to religious exercises and exposure to religious symbols. With respect to either religious exercises or symbols, the question for standing purposes is whether the plaintiff's exposure gives rise to any personal injury apart from the "psychological consequence" of observing "conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485.

[9] Some of respondent's amici propose a slightly different formulation of the standing inquiry: a plaintiff has standing to challenge any governmental action that interferes with his use or enjoyment of public property. American Jewish Congress Amicus Br. 4-5; Americans United for Separation of Church and State Amicus Br. 24-25. But once again, the only reason that the display of the cross interferes with respondent's use or enjoyment of Sunrise Rock is that he finds the presence of the cross at odds with his view of the Establishment Clause.

4. Respondent argues that courts should "not inquire into whether a person's conduct or beliefs are religious in nature." Br. 26-27. But there is no dispute on that score: the government agrees. The government is not asking this Court to inquire into the nature of respondent's beliefs. The government is simply asking this Court to take respondent at his word. Respondent has testified in this litigation that the display of the cross, whether on public or private property, does not violate his religious beliefs. J.A. 64, 85. He has never claimed that the display or transfer of the cross directly or indirectly coerces him. See *Weisman*, 505 U.S. at 592. Neither has he asserted that the cross makes him feel like an outsider rather than a full member of the political community. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment). Based on his own pleadings, respondent's action is founded on an abstract and generalized view of the Establishment Clause, rather than on a concrete and personal injury from the alleged establishment. In those circumstances, respondent is no different from any other citizen who believes that the Constitution compels a different course of conduct. Because respondent has not pointed to "an injury other than [his] belief that the [display or] transfer violate[s] the Constitution," *Valley Forge*, 454 U.S. at 487 n.23, he lacks standing to challenge either action.

B. Respondent Lacks Prudential Standing Because He Asserts The Rights Of Third Parties

Respondent barely contests (Br. 28-29) the government's assertion that he lacks prudential standing. Respon-

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Nor is amici's test capable of more general application to other Establishment Clause cases that do not involve the use of government lands or facilities.

dent argues that "[he] was personally confronted with, and offended by, government promotion of a sectarian religious symbol." Br. 28. But that argument misses the point: respondent testified that he is offended only because other persons have not been permitted in the past to display their own symbols atop Sunrise Rock. J.A. 50, 64. Respondent himself has never expressed any desire to erect an additional display atop Sunrise Rock, asserting instead only the rights of others to do so. In those circumstances, for the reasons stated in the government's opening brief (at 17-20), the Court should refrain from adjudicating the matter. The doctrine of prudential standing exists to allow judges to avoid deciding cases like this one, where the validity of an Act of Congress rests on a purely hypothetical dispute concerning the putative rights of unknown third parties.

III. CONGRESS'S TRANSFER OF THE LAND TO A PRIVATE PARTY WILL ELIMINATE THE ESTABLISHMENT CLAUSE VIOLATION

A. Congress's Transfer Of The Land To Eliminate The Establishment Clause Violation Should Be Presumed Valid

Respondent asserts that the district court had "discretion" to enjoin the transfer as an insufficient remedy for the violation that the court had found. Br. 54. But the court's injunction against display of the cross did not give the court discretion to set aside a subsequent Act of Congress transferring the land, pursuant to Congress's plenary power "to dispose of * * * Property belonging to the United States." U.S. Const., Art. IV, § 3, Cl. 2; *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 201 (1987). The only question before this Court is whether the transfer itself or the government's alleged exercise of authority over Sunrise Rock following the transfer violates the Establishment Clause.

That question, as the parties agreed below, is subject to de novo review. Pet. Br. 31 n.4.

In answering that question, this Court should presume that the 2004 Act removes the predicate for the previous constitutional violation—public ownership of Sunrise Rock. As a general matter, this Court imputes to Congress an intent to pass legislation that is consistent with the Constitution. See, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994); *Yates* v. *United States*, 354 U.S. 298, 319 (1957). Here, that stance requires respecting Congress's intent, when faced with an injunction that prevented display of the cross, to enact legislation effecting a bona fide divestment of the property. There is, indeed, no evidence to the contrary. Pet. Br. 24-26; *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). Respondent offers several theories of how the government retains surreptitious control of the memorial. But none withstands the slightest scrutiny, let alone overcomes the presumption of validity that should attach to congressional action designed to eliminate a constitutional violation.

B. Congress's Efforts To Preserve Sunrise Rock As A War Memorial Do Not Undermine The Transfer's Validity

1. Respondent asserts that the transfer will not sufficiently disassociate the government from the cross, because "[a]s one of the few displays that Congress has designated a national memorial, the cross necessarily will reflect continued government association." Br. 38. Respondent cites nothing in support of that assertion, nor could he. There are a host of congressionally designated national memorials on nonfederal land.[10] Congress typically designates a pri-

[10] Such memorials include the Benjamin Franklin Memorial Hall, which is a portion of the Franklin Institute Science Museum in Philadel-

vately owned site as a national memorial in order to recognize its cultural or historical significance. Such a designation neither subjects the memorial to governmental control nor converts the owner's conduct into state action for purposes of the Establishment Clause.

The best evidence of Congress's purpose in designating a national memorial, whether on public or private property, is the particular statute establishing the memorial. Here, Congress designated a national memorial "commemorating United States participation in World War I and honoring the American veterans of that war." J.A. 44. That purpose, needless to say, is legitimate. Nor does a purpose of this kind become suspect because the memorial in question has religious meaning to some citizens. For instance, Congress designated the Father Marquette National Memorial on nonfederal land in St. Ignace, Michigan, "to commemorate the advent and history of Father Marquette * * * , including his establishment of a mission at Saint Ignace in 1671, and his historic exploration * * * of the Mississippi River in 1673." Act of Dec. 20, 1975, Pub. L. No. 94-160, 89 Stat.

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phia, Pennsylvania, Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164; the David Berger Memorial, which is a sculpture located on the grounds of a Jewish community center in Cleveland Heights, Ohio that commemorates Israeli athletes killed at the Munich Olympic Games, National Parks and Recreation Act of 1978, Pub. L. No. 96-199, § 116, 94 Stat. 71; the Red Hill Patrick Henry National Memorial, which is the Revolutionary leader's privately operated home in Charlotte County, Virginia, Act of May 12, 1986, Pub. L. No. 99-296, 100 Stat. 429; the AIDS Memorial Grove, which is a portion of a state park in San Francisco, California, Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 516, 110 Stat. 4170; and America's National World War I Museum, which is a privately financed and operated museum in Kansas City, Missouri, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Subtit. D, § 1031, 118 Stat. 2044.

848. That some may regard this memorial as honoring the Society of Jesus does not render the government's action a violation of the First Amendment.

2. Respondent also asserts (Br. 51-53) that the government's earlier actions involving the memorial effectively taint the transfer. But the 2001 and 2002 Acts themselves had legitimate secular purposes—designation of the site as a national memorial and prevention of that memorial's destruction during the pendency of this litigation. Pet. Br. 36-39.[11] Neither provides any evidence of a course of impermissible conduct, and respondent does not seriously attempt to demonstrate otherwise. In any event, those Acts are irrelevant because an intervening event—the district court's entry of an injunction—reshaped Congress's purpose. Faced with that injunction, Congress legislated a bona fide divestment of the property to eliminate the violation. Respondent cannot cast suspicion on that action by pointing to earlier legislative enactments that responded to entirely different factual circumstances.

3. Respondent asserts repeatedly (Br. 38, 40, 49) in attacking Congress's designation of the site as a national memorial that the Sunrise Rock cross communicates only a single, sectarian message. He does not discuss this Court's recent decision in *Pleasant Grove City* v. *Sum-*

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[11] Congress twice prohibited the spending of any federal funds to remove the memorial. Pet. Br. 36-38. Respondent contends that because the latter enactment followed the district court's injunction, see Department of Defense Appropriations Act, 2003 (2003 Act), Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551, its "sole purpose and effect" was to prevent the Park Service from complying with that injunction. Resp. Br. 53. But the Park Service could comply with both the 2003 Act and the injunction as it always has: by covering the cross. The evident purpose of the 2003 Act was to forestall the memorial's destruction while Congress considered alternative measures, like the transfer of the memorial to a private party.

mum, 129 S. Ct. 1125 (2009), recognizing that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure." *Id.* at 1136. Here, at the very least, the World War I veterans who erected the cross in 1934 believed that they were commemorating "the Dead of All Wars," even if through the use of a religious symbol. Pet. App. 56a.[12] In any event, respondent's contrary assertion does not undermine the *transfer* at issue here. If the 2004 Act validly transfers the memorial into private hands (and it does), then the message no longer comes from the government, but from the VFW. From now on, the VFW can convey that message—or, by replacing the current memorial with another, can change that message—as it wishes.

C. Congress Did Not Reserve Continuing Control Over Sunrise Rock

1. Respondent contends that the reversionary clause leaves the government with an "ownership interest" in the transferred land. Br. 42. Certainly it does: that is the very purpose of such a clause. Congress intended the transferred land always to bear a memorial demonstrating respect for fallen service members, and to ensure the accomplishment of that secular purpose it provided the government with a reversionary interest. The court of appeals held that the reversionary clause "results in ongoing government control over the subject property," Pet. App. 80a,

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[12] Respondent does not say what should happen to the "many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." Pet. App. 47a n.6. On respondent's view, presumably each of those monuments violates the Establishment Clause—and the government cannot even eliminate the putative violation by transferring the monument to private ownership, at least in any way that preserves the monument as a war memorial. See p. 22, *infra*.

but respondent does not even attempt to defend that proposition. He formerly speculated that the VFW might be required to maintain the cross at Sunrise Rock, Br. in Opp. 23, but now concedes that the VFW is only required "to maintain *the land* as a memorial to American veterans of World War I." Resp. Br. 42 (emphasis added). How the VFW elects to maintain the land as a memorial is up to the VFW, not the government.[13]

2. Respondent asserts that because "the land on which the cross is located is within the boundaries of the Mojave Preserve, the cross remains 'under the jurisdiction of the federal government.'" Br. 44 n.31. Respondent fails to appreciate the limited nature of the Park Service's authority over private inholdings at the Preserve. The National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, permits the Park Service to regulate nonfederal property within the Preserve only to the extent that activities on those inholdings affect park property. Pet. Br. 41.[14] Respondent correctly does not argue that the Park Service's limited and incidental authority over inholdings would allow it to re-

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[13] Elsewhere in his brief, respondent backtracks, stating that the reversionary clause "relates to the maintenance of the symbol," Br. 43, or that the "war memorial *is* the cross," Br. 52. But as the government has explained, see Pet. Br. 33, Congress carefully required only that the VFW maintain the "parcel of real property" as a war memorial. § 8121(a), 117 Stat. 1100; see § 8121(e), 117 Stat. 1100. Respondent does not address Congress's considered phrasing.

[14] Respondent cites (Br. 44 n.31) statutes that establish the Preserve, see 16 U.S.C 410aaa-42 and 410aaa-43, and that authorize the Secretary to acquire private inholdings within the Preserve, see 16 U.S.C. 410aaa-56. But unless and until private inholdings within the Preserve are so acquired, they may be regulated only to the extent that activities on those inholdings affect park property. Pet. Br. 41.

quire the VFW to display the cross (or any other symbol) on the VFW's land.[15]

Respondent also asserts (Br. 46-47) that, as a national memorial, Sunrise Rock will remain part of the National Park System and therefore be subject to the Park Service's plenary authority even after the transfer. For that proposition, respondent relies on a provision, Act of Aug. 8, 1953, ch. 382, § 2(a), 67 Stat. 496, that was repealed in 1970. See Act of Aug. 18, 1970, Pub. L. No. 91-383, § 2(b), 84 Stat. 82 (16 U.S.C. 1c(a)). National memorials are not automatically included within the National Park System; rather, they may exist on either public or private land, and are included within the National Park System only if administered by the Park Service pursuant to some other source of law. *Ibid.* Because the Sunrise Rock memorial will be privately owned following the transfer, the Park Service will neither administer it nor have any other authority to require display of the cross. In the end, respondent does not point to any federal statute or regulation that will afford the government any relevant control over Sunrise Rock following the transfer.

D. Congress's Method Of Transferring Sunrise Rock Does Not Undermine The Transfer's Validity

1. Respondent argues that the land transfer is invalid because Congress "bypassed the normal statutory channels." Br. 49. It is hard to know what respondent

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[15] Respondent points (Br. 44-45) to 18 U.S.C. 1369(a), which criminalizes the willful injury or destruction of any veterans' display "on public property." But following the transfer, Sunrise Rock will not be on public property. In any event, given that the 2004 Act requires only that the VFW maintain the parcel of property as a war memorial, replacing the cross with another type of structure would not "injure" or "destroy" the memorial within the meaning of Section 1369(a).

means: Congress often enacts statutes involving specific federal property, and nothing prevents it from doing so in an appropriations bill. Pet. Br. 48-49. Respondent cites (Br. 50) a single case, *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994) (*Kiryas Joel*), in which this Court held unconstitutional under the Establishment Clause a state statute creating a separate school district for a religious sect. *Id.* at 705. But *Kiryas Joel* surely did not prohibit a legislature from acting directly to address an Establishment Clause *violation*. Judicial findings of constitutional violations appropriately may command the legislature's attention. See *id.* at 726 (Kennedy, J., concurring in the judgment) ("It is normal for legislatures to respond to problems as they arise—no less so when the issue is religious accommodation.").

2. Respondent also claims (Br. 50-51) that although it is "logical for the government to return the cross to the VFW" or even "[to] sell the land" to the VFW as part of an open bidding process, "it is not logical for the government to sell [the land] to the VFW just because the cross is on it." Br. 51. According to respondent, that is explicable only by reference to "favoritism." *Ibid.* But the government's action is "illogical" only if it may not take a legitimate interest in preserving a war memorial at Sunrise Rock. If that is a legitimate government interest, then it is perfectly sensible to transfer the land to an entity that cares about such matters. Pet. Br. 48. In urging this Court to destroy long-standing memorials across this Nation or else place them on the auction block, respondent seeks not neutrality, but hostility, toward religion.[16]

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[16] Even assuming that the land transfer does not extinguish the Establishment Clause violation, respondent agrees that "[a] valid remedy responds to the specific nature of the violation." Br. 49. A far more tailored remedy in these circumstances would be to require fencing or

IV. THIS CASE WAS NOT MOOT BEFORE THE COURT OF APPEALS

Respondent abandons his argument that this case is moot, but some of his amici do not. Public Employees for Environmental Responsibility and the Western Lands Project Amici Br. 4-6 (Amici). Those amici claim (*id.* at 3, 17-18) that the court of appeals lacked jurisdiction because VFW Post 385's charter was temporarily revoked for administrative reasons, and thus that this Court must vacate and remand for further proceedings. Amici thus want to replay the current round of litigation—which has taken four years—when no one disputes that VFW Post 385 stands ready to receive the land if the present injunction is lifted. This Court is not required to endorse that senseless result, because amici have not carried their "heavy burden" of establishing that this case was once moot on appeal. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

Notably, amici do not contest that when Post 385's charter was revoked, the Department of California VFW assumed ownership of and responsibility for Post 385's property as its successor in interest pursuant to the VFW's bylaws. Amici also do not contest that dissolution of an organization does not render a case moot when, as in this case, the lawsuit could affect the rights of the dissolved organization's successor in interest. *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944). That should be the beginning and end of the mootness analysis: because the California VFW would have taken possession of the land, this case continued to present a live controversy.

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additional signage rather than to invalidate wholesale an Act of Congress. Pet. Br. 51-52. Respondent makes no effort to explain why such measures would not sufficiently disassociate the government from the memorial following the transfer.

Amici contend (at 6-7), however, that the 2004 Act's requirements for joint appraisals and a cash equalization payment are conditions precedent to the land transfer; and, further, that because the injunction against the transfer prevented the government from performing those conditions before Post 385's charter was revoked, Post 385 did not have any property interest to pass on to the California VFW. For the proposition that the appraisals and cash equalization payment are conditions precedent, amici cite three decisions of this Court involving the Act of Sept. 27, 1950 (Donation Act), ch. 76, 9 Stat. 496, which granted lands to Oregon settlers who resided on and cultivated those lands for four years. See *Hall* v. *Russell*, 101 U.S. 503, 510 (1880); *Vance* v. *Burbank*, 101 U.S. 514, 521 (1880); *Maynard* v. *Hill*, 125 U.S. 190, 214-215 (1888). Those decisions depended, however, on the particular language of the Donation Act. See *Hall*, 101 U.S. at 510. The more general rule is that "[e]very interest in lands," including an interest granted by federal statute, "is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary." *Smelting Co.* v. *Kemp*, 104 U.S. 636, 651 (1880); see, *e.g.*, *McCune* v. *Essig*, 199 U.S. 382, 389 (1905). The question remains the intent of Congress, in light of the text, structure and purpose of the entire conveyance, see *Missouri, Kan., & Tex. Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1876), and here Congress clearly intended to direct a land exchange in order to restore the memorial to the VFW.[17]

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[17] Amici point (at 12-14) to the interpretive principle that public grants are to be construed in favor of the government, but that principle applies when it is unclear what property the government intended to convey. See, *e.g.*, *Caldwell* v. *United States*, 250 U.S. 14, 398 (1919). There is no such lack of clarity here. Likewise, amici point (at 10-12) to Section 206 of the Federal Land Policy and Management Act of 1976,

Finally, even assuming both that the case was formerly moot and that such a defect was not cured by the reinstatement of Post 385, "[t]he established practice * * * is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Contrary to amici's assertion (at 17-18), they cannot preserve the district court's favorable judgment which the government—through no fault of its own—would have been prevented from challenging. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) ("Vacatur clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review.") (internal quotation marks and citation omitted). Nothing in law or logic, however, requires the replay of the current litigation that would result from vacatur of the district court's judgment.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

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43 U.S.C. 1716, and various regulations, which do not apply to lands administered by the National Park Service. See 43 U.S.C. 1702(e); see also 43 C.F.R. 2200.0-5(i).

AMICUS CURIAE BRIEF

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(10)

No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., *Petitioners,*

v.

FRANK BUONO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND FIFTEEN MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of record for amici has presented oral argument before this Court numerous times, including most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

ACLJ attorneys often defend various governmental entities against claims that the presence of a religious symbol on government property violates the Establishment Clause. *See e.g.*, *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004). The offended observer standing rule, which emerged after (and contrary to) this Court's ruling in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), allows the plaintiffs in these cases to plead merely that they had contact with and are offended at the alleged constitutional violation.

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

A *sui generis* principle, offended observer standing is devoid of support in this Court's Article III standing jurisprudence. The Court has never specifically addressed the offended observer standing doctrine although the Court has assumed jurisdiction in several of these cases. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005). The ACLJ strongly urges the Court to address the proper boundaries of Article III standing in Establishment Clause cases, and specifically to reaffirm *Valley Forge*'s holding that mere offense at government conduct is never enough to satisfy Article III's requirement of a concrete and particularized injury.

This brief is also filed on behalf of Todd Akin, Michele Bachmann, Roy Blunt, John Boehner, Eric Cantor, Randy Forbes, Scott Garrett, Walter Jones, Jim Jordan, Doug Lamborn, Thaddeus McCotter, Jeff Miller, Mike Pence, Joseph Pitts, and Joe Wilson. These amici currently are members of the United States House of Representatives in the One Hundred Eleventh Congress and are concerned with the offended observer standing doctrine's erosion of separation of powers.

SUMMARY OF THE ARGUMENT

Offended observer standing is irreconcilable with this Court's decisions. *See Valley Forge*, 454 U.S. 464; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *United States v. Richardson*, 418 U.S. 166, 179-180 (1974). *Valley*

Forge specifically held that the mere observation of a government violation of the Establishment Clause is not enough to constitute injury for purposes of Article III standing. Yet despite *Valley Forge*, mere observation is the standard proffered for standing in lower court religious display cases (as here). If *Valley Forge* is not to be eviscerated, it must mean that offended observer standing is an aberration with no support in this Court's standing jurisprudence.

Offended observer standing is flawed for numerous other reasons as well. For example, it conflates the merits of the claim with the injury. Although there are doubtless myriad ways in which government speech or displays might offend various citizens, only those who bring an Establishment Clause claim are allowed to make a federal case out of their offense.

Offended observer standing also encroaches upon the separation of powers. This Court repeatedly has said that lax standing requirements lead to judicial supremacy over the politically accountable branches of government. Offended observer standing sweeps sizable categories of otherwise politically accountable government action into judicially reviewable litigation.

ARGUMENT

Mr. Buono is offended by the display of a cross on Sunrise Rock in the Mojave National Preserve. His offense derives from the fact that Sunrise Rock is not

open to other groups and individuals to erect other permanent displays. Of course, this term, the Court unanimously repudiated the notion that citizens have a constitutional right to erect permanent displays in public parks. *Pleasant Grove*, 129 S. Ct. 1125, 1138 (2009) ("The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."). Regardless of the underlying merits of Mr. Buono's claim, his offense is essentially the "psychological consequence presumably produced by *observation* of conduct with which [he] disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis added).

This case is only the most extreme example of a phenomenon that has plagued the federal courts for the past three decades. Ideologically motivated citizens and public interest groups [1] search out alleged Establishment Clause violations, almost always in the form of a passive religious symbol or display of some sort, and make a federal case out of offense at the display. The basis for standing is

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[1] Typically, if not universally, the plaintiffs are adherents of the view that there must be a high wall of separation between church and state. They, thus, "dislike any government reference to God." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007).

typically that the religious display offends the sensibilities of the plaintiffs. The offense may be characterized as an affront to religious values,[2] or as one in which plaintiffs feel stigmatized as political or community outsiders.[3] But the sum and substance of the injury is that the display bothers the plaintiffs.[4]

Offended observer standing is inconsistent with Article III. This Court should therefore reverse and remand with instructions to dismiss for want of standing.

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[2] *E.g.*, *ACLU-NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Freedom From Religion Found. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1106-07 (11th Cir. 1983).

[3] *E.g.*, *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (plaintiffs alleged that they were made to feel like "second class citizens").

[4] *E.g.*, *Van Orden v. Perry*, 2002 U.S. Dist. LEXIS 26709 (W.D. Tex 2002).

I. "Offended Observer" Standing is an Indefensible Anomaly in Article III Standing Doctrine.

A. Offended Observer Standing Is Irreconcilable With This Court's Long-Standing Refusal to Serve as a Forum for Generalized Grievances.

This Court has "'consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). The requirement of a particularized and concrete injury serves "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Article III standing requirements are most important "when matters of great national significance are at stake" because they safeguard this Court's duty to "guard jealously and exercise rarely [its] power to make constitutional pronouncements." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

The cases of *Schlesinger*, 418 U.S. at 222, and *Richardson*, 418 U.S. at 179-180, established that being disturbed by a governmental violation of the Constitution is never enough, by itself, to qualify as a concrete, particularized injury under Article III. *Schlesinger*, 418 U.S. at 220; *Richardson*, 418 U.S. at 176-77. *See also Richardson*, 418 U.S. at 191 (Powell, J., concurring) ("The power recognized in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing.").

In *Valley Forge*, 454 U.S. at 482-90, the principles articulated in *Richardson* and *Schlesinger* were applied to claims brought to enforce the Establishment Clause. The *Valley Forge* Court repudiated the notion that offense at alleged Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in *Schlesinger* and *Richardson*: The court knew of "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Id.* at 484-85. The Court noted further that "the proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Id.* at 485 (quoting *Schelsinger*, 418 U.S. at 227).

Valley Forge could not have been more clear that Article III standing cannot be premised upon mere psychological offense at the government's alleged complicity in religion. This is true whether the person claiming the offense actually views the conduct or merely hears about it. *Id.* at 487 n.23 (finding it irrelevant that some of the Association's members lived Pennsylvania, perhaps in close proximity to the college). Proximity "does not establish an injury where none existed before." *Id.* The "psychological consequence presumably produced by *observation* of conduct with which one disagrees," does not constitute "an injury sufficient to confer standing under Article III." *Id.* at 485 (emphasis added).

Offended observer standing is therefore irreconcilable with *Valley Forge, Schlesinger,* and *Richardson* because "it treats observation *simpliciter* as the injury." *Books,* 401 F.3d at 871 (Easterbrook, J., dissenting). In no other context would – or should – mere observation of offensive government conduct confer Article III standing to bring a federal case.

For example, a devout Christian viewing a government-funded depiction of a cross immersed in urine[5] might suffer an affront to his spiritual values that is no less, and quite possibly, much more profound than the offense suffered by the strict

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[5] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 574 (1998) (challenged statute enacted after NEA funded "art" depicting crucifix immersed in urine).

separationist plaintiff who observes a Decalogue display in the county courthouse. Hasidic Jews might suffer an affront to their spiritual values from viewing a public television show espousing the view that the City of Jerusalem should be ceded in its entirety to the Palestinians as part of a Mid-East peace accord. Finally, there can be no doubt of the widespread offense that would result from the government's public execution of a convicted felon. *See Valley Forge*, 454 U.S. at 489 n.26 (listing imposition of capital punishment and implementation of affirmative action as "but two among . . . many possible examples" of government action that could trigger claims "on the basis of a personal right to government that does not [violate] commands in the Constitution").

Under *Valley Forge*, however, it does not matter how severe the offense to spiritual or other personal values or how outrageous or unconstitutional the government conduct is. *Id.* at 484 (rejecting argument that "Article III burdens diminish as the importance of the claim on the merits increases"). The plaintiff must show that he personally suffered a "distinct and palpable" injury apart from mere offense at exposure to the government conduct. *Id.* at 488.

If standing were allowed in these and other scenarios where government conduct or speech caused offense to the spiritual (or other) values of citizens, the possibilities become endless. For example, pacifist Quakers could sue over offense

from war memorials in which the government appears to be endorsing the just war theory of other Christian denominations. Vegetarians whose beliefs include the conviction that the sanctity of animal life is equal or comparable to that of human life could sue over offense from government messages endorsing the consumption of meat. *See Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005) (federal advertising program promoting beef consumption). Catholics who adhere to church teaching on the sanctity of human life from conception could take offense at all government messages promoting abortion. *See also Books*, 401 F.3d at 870 (Easterbrook, J., dissenting) (listing examples of how government messages could cause offense to various segments of the population). Eventually, government speech would be chilled into extinction.

In any event, worst case scenarios usually have political consequences. *See Nat'l Endowment for the Arts*, 524 U.S. at 574 (public outcry against government funding of cross immersed in urine display resulted in the enactment of federal decency standards for NEA art funding). As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Richardson*, 418 U.S. at 179; *see also Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000) (citizenry who object to government speech can elect new officials who "espouse some different or contrary

position"). Thus, even a directive that a Latin cross be mounted on every government building[6] is subject to correction after the next election.

B. The Lower Courts' Adoption of Offended Observer Standing Is Based on a Misreading of Valley Forge and Abington v. Schempp.

Notwithstanding *Valley Forge*'s clarity on the illegitimacy of psychological offense as a basis for standing to bring Establishment Clause suits, numerous lower federal courts have read *Valley Forge* to permit standing where the plaintiff alleges that he has seen and been offended by a religious display. *See, e.g., ACLU-NJ ex rel. Miller*, 246 F.3d at 266; *Suhre*, 131 F.3d at 1086; *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin*, 812 F.2d at 692-93; *Rabun County Chamber of Commerce*, 698 F.2d at 1106-07. *But cf. Zielke*, 845 F.2d at 1467-68;

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[6] *See County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting). Of course, "speech may coerce in some circumstances," *id.*, for example with mandatory indoctrination of public school children, or mandatory "diversity" reeducation of public employees. In such cases, standing would rest, not on mere observation, but on *government coercion* of observation. *See Valley Forge*, 454 U.S. at 486 n.22 (distinguishing school prayer cases).

Murray v. City of Austin, 947 F.2d 147, 151 (5th Cir. 1991).

The error stems from a misreading of the *Valley Forge* Court's discussion of *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). The *Valley Forge* Court distinguished *Schempp* by pointing out that the plaintiffs in that case suffered injury because "impressionable schoolchildren were *subjected* to unwelcome religious exercises or were *forced* to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22 (emphasis added). The lower courts that have extrapolated from that language the doctrine of offended observer standing by equating the passive viewing of a religious display with subjection to "unwelcome religious exercises" simply ignore the fact that public school children are *compelled to be there and listen.*

For example, in *Rabun County Chamber of Commerce*, 698 F.2d at 1106-07, the first federal appellate decision in a religious display case after *Valley Forge*, the court concluded that plaintiffs who were offended by the presence of a cross in a state park had standing to sue. Noting that the schoolchildren in *Schempp* were subjected to "unwelcome religious exercises," the court inexplicably concluded that "no less can be said of the plaintiffs in [this] case." *Id.* at 1108. Because the plaintiffs chose to avoid use of the park, their injury was like that of the *Schempp* schoolchildren. *Id.* Obviously, there are no truancy penalties for failure to use a park, and no government authority

can discipline those who fail to "pay attention" to a given display.

The Fourth Circuit likewise equated "unwelcome religious exercises" with the observation of a passive religious display for purposes of Article III's injury requirement in *Suhre*. The court went so far as to add the term "religious display" to this Court's discussion of *Schempp* in *Valley Forge*. "[L]ike *Schempp* before it, *Valley Forge* recognized that direct contact with an unwelcome religious exercise *or display* works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086 (emphasis added).

Additionally, the Fourth Circuit placed great weight on this Court's addressing of the merits in *Allegheny County* and *Lynch v. Donnelly*, 465 U.S. 668 (1984). "The best proof of our reading of *Valley Forge* lies in the actions of the Supreme Court itself." In *Lynch* and *Allegheny County*, "the Court has proceeded to the merits of the challenges to the displays and found no infirmity in the standing of plaintiffs alleging direct contact with them." *Suhre*, 131 F.3d at 1088. *See also Murray*, 947 F.2d at 151 ("considerable weight" given to the fact that standing was not an issue in *Lynch* and *County of Allegheny*).

Such reliance is manifestly wrong. The Court consistently has held that it "is not bound by a prior exercise of jurisdiction in a case where [jurisdiction] was not questioned and it was passed *sub silentio*."

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (citations omitted); *See also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

In any event, as one Fifth Circuit judge bluntly stated:

> The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue. That is, it cannot continue to hold expressly that the injury in fact requirement is no different for Establishment Clause cases, while it implicitly assumes standing in cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse.

Doe, 494 F.3d at 500 (DeMoss, J., concurring).

The concept of offended observer standing drains *Valley Forge, Richardson,* and *Schlesinger* of all meaning. Mere exposure to an unwelcome religious display is not equivalent to coerced exposure to a religious exercise, any more than coerced exposure to

a patriotic exercise is equivalent to viewing the Statue of Liberty or the Capitol Rotunda. "Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting).

The vast constitutional gulf between coerced exposure to a religious exercise and the mere observation of a passive religious symbol or display was most poignantly expressed by Judge Easterbrook in *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting).

> Words do not coerce. *See Rust v. Sullivan*, 500 U.S. 173 (1991). A barrage of advertisements tempting young people to join the military does not oblige anyone to do so; no more does display of the Ten Commandments coerce support for religion. The Magna Carta (which begins "John, by the grace of God, king of England . . .") is part of this display, yet Elkhart County does not establish divine-right monarchy. Lady Justice, derived from the Greek goddess Themis, is in the display, but Elkhart County has not established the ancient pantheon as its religion. No one would understand any document's presence in this display to suggest that Elkhart County imposes either legal or social sanctions on nonbelievers. *Cf. Santa Fe Independent School*

District v. Doe, 530 U.S. 290, 310-13 (2000) (prayer before public high school event entails social disapproval of those who do not participate, and thus coerces religious conformity).

What the display may do is give offense, either to persons outside the religious tradition that includes the Book of Exodus or to those who believe that religion and government should be hermetically separated. Yet Themis may offend Christians (and all icons offend Muslims), the military's ads offend religious pacifists, and the message in *Rust* supports one religious perspective on human life while deprecating others. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-87 (1992) (states may require physicians to tell women about the risks of abortion and the advantages of childbirth). Public policies and arguments pro and con about them often give offense, as do curricular choices in public schools. *See Webster v. New Lenox School District*, 917 F.2d 1004 (7th Cir. 1990). But the rebuke implied when a governmental body supports a point of view that any given person finds contemptible (or believes should be left to the private sector) is a great distance from "coercion." So great a distance, indeed, that the insulted person lacks standing to sue.

The additional requirement in some circuits, that plaintiffs must allege that they have altered their behavior to avoid the unwelcome contact with the religious display, does nothing to create an "injury" out of mere psychological offense. *See, e.g., Rabun County Chamber of Commerce*, 698 F.2d at 1108; *Zielke*, 845 F.2d at 1468; *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985). *See* Brief of Petitioner at 16-17, *Salazar et al. v. Buono*, 08-472 (June 1, 2009). As the United States explains, "plaintiffs cannot bootstrap their way into standing by choosing to inflict on themselves an additional or different injury." *Id.* at 17.

Valley Forge established that there is no "sliding scale of standing," yet that is precisely what exists in the lower federal courts. "Offended observer" standing is untenable and has turned the federal courts into "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U.S. at 487. A correct understanding of *Schempp* requires that plaintiff show some *coercion*, not mere contact with a passive display. *See Schempp*, 374 U.S. at 224; *cf. Santa Fe Indep. Sch. Dist.*, 530 U.S. 310-13 (religious conformity coerced when religious exercise before public high school event risks social disapproval of those who do not participate); *see also Bowen v. Roy*, 476 U.S. 693, 703 (1986) (objecting citizens cannot dictate how government orders its internal operations).

II. Offended Observer Standing Expands the Judicial Role at the Expense of Separation of Powers.

The standing requirements of Article III are essential to maintain the proper separation of powers between the Congress, the Executive, and the Judiciary, and between the federal government and the states. *E.g., Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct., 2553, 2570 (2007) (plurality); *id.* at 2573 (Kennedy, J., concurring); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006); *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Lujan*, 504 U.S. at 576-77 (1992). Offended observer standing is just the sort of lax standard that fosters "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

As the lower court's decision in this case demonstrates, offended observer standing reallocates power away from the politically accountable branches of government and results in expanded judicial overview. Whenever "one or more of the branches seek to transgress the separation of powers," "liberty is always at stake." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also Schlesinger*, 418 U.S. at 222 ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the

potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); *Richardson*, 418 U.S. at 179-80 (Founding Fathers did not intend judiciary to act as Athenian democracy overseeing the conduct of the national government).

The sheer volume of religious display cases that have flooded the courts[7] in the past three decades is

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[7] For example, Ten Commandments display cases alone comprise a small percentage of religious display cases, yet they are legion. *Books*, 401 F.3d 857; *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated and reh'g granted by* No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Freethought Soc'y* of *Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Turner v. Habersham County*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003), *rev'd and remanded sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002); *Baker v. Adams County/Ohio Valley Sch. Bd.*, No. C-1-99-94, 2002 U.S. Dist. LEXIS 26226 (S.D. Ohio 2002), *aff'd*, 86 F. App'x 104 (6th Cir. 2004); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000); *Ind. Civ. Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000), *aff'd*, 259

proof positive that offended observer standing has catapulted the federal judiciary into the role of "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U.S. at 487. Offended observer standing, like the lax taxpayer standing sought in *Hein*, improperly "enlist[s] the federal courts to superintend . . . the speeches, statements and myriad daily activities" of government officials. *Hein*, 127 S. Ct. at 2570 (plurality).

III. Offended Observer Standing Also Conflates the Merits of an Establishment Clause Claim with the Standing Inquiry and Promotes Religious Divisiveness.

Offended observer standing is not only indefensible under this Court's precedents, it also conflates the merits of the claim with the plaintiff's injury and promotes religious divisiveness.

In other contexts, this Court has held that feelings of stigmatization do not constitute injury sufficient to establish standing, even where the government conduct giving rise to those feelings is unquestionably unlawful.

> Neither do [plaintiffs] have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination.

F.3d 766 (7th Cir. 2001); *Harvey*, 811 F. Supp. 669, *aff'd*, 15 F.3d 1097.

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. *Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.*

Allen v. Wright, 468 U.S. 737, 755 (1983) (citations omitted) (emphasis added).

Only those plaintiffs with an Establishment Clause claim are permitted to haul the government into federal court for objections to government conduct or speech on the mere basis of offence taken. All others who suffer an affront to their sensibilities from government speech or conduct must turn their backs and ignore the offense. Federal court vindication is not an option.

To the extent that "divisiveness" is a proper consideration in Establishment Clause adjudication, *compare Van Orden*, 545 U.S. at 704 (Breyer, J., concurring), *and Schempp*, 374 U.S. at 307 (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children"), *with Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002) (and

cases cited) (potential for "divisiveness" properly disregarded), privileging with unique standing those who assert offense over religious symbols aggravates, rather than mitigates, such divisiveness.

Legal scholars have noted the divisive effect of "encourag[ing] people to think that what seem to be minor irritations are in reality violations of some sacred principle for which they have a duty to fight." Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 830 (1984). Litigation over religious symbols, in which only certain types of offense will secure the plaintiff a day in court, "exacerbates religious division and discord by heightening the sense of grievance over symbolic injuries." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 192 (1992).

> Does anyone believe that the annual outbreak of lawsuits over the symbols of the December holidays advances the cause of religious harmony or civic understanding? When a constitutional doctrine aggravates the very problem it is supposed to solve, without offering hope for resolution, it should be replaced.

Id. at 193 (discussing the endorsement test).

In uniquely privileging only Establishment Clause claimants, offended observer standing also skews public discourse. "[T]he Constitution does not

guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove Unified Sch. Dist*, 542 U.S. at 44 (O'Connor, J., concurring). *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2004) (Government creation of two-tiered litigation system in a certain class of cases distorts usual function of court system).

CONCLUSION

The lower federal appellate courts need to hear the message of *Valley Forge* again in this case. This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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June 8, 2009

AMICUS CURIAE BRIEF

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(18)

No. 08-472

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

FRANK BUONO,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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B. Respondent Buono's injury is no longer fairly traceable to the defendant's challenged action. 11
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doubt would be inconsistent with this Court's precedents regarding the nature and purpose of standing doctrine and waste scarce judicial resources. 20

A. The nature and purpose of the case-or-controversy requirement, as represented in the standing inquiry, would be contravened by a finding that Mr. Buono retains standing to continue this case. 21

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C. Finding standing under these circumstances would permit a private party to misappropriate judicial power. 25

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or conform to a particular ideology. It was founded in 1998 by longtime Reagan policy advisor and architect of modern welfare reform Robert B. Carlson, and since that time has briefs as amicus curiae on constitutional law issues in cases across the nation.

Those individuals setting the ACRU's policy as members of its Policy Board are: former U.S. Attorney General Edwin Meese III, former Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit, and Dean of Pepperdine Law School Kenneth W. Starr, former Assistant Attorney General for Civil Rights William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor Dr. James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that all constitutional rights are fully protected, not just those that may advance a

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[1] Peter J. Ferrara and Kenneth A. Klukowski authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored this brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

particular ideology. This includes the proper application of the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

The instant case presents a question of first impression before this Court. After several rounds of litigation, Congress enacted a statutory provision granting Respondent Frank Buono the relief he sought, and the executive branch set about administering that relief. The respondent then sought and obtained a federal injunction to stop the very relief he had pursued for years, and now claims this Court's jurisdiction to continue adjudicating this matter.

The question therefore presented in this brief is whether the injury that Respondent Buono claims as his basis for standing is still fairly traceable to the federal government, or instead if his action in obtaining an injunction to bar relief constitutes an intervening act that negates traceability. For the reasons set forth below, Respondent Buono does not have standing under Article III.

Standing requires that a plaintiff suffer a particular form of injury that is fairly traceable to the defendant's challenged conduct and would likely be redressed by the court granting the requested relief. Standing arises from the Article III case-or-controversy requirement.

On behalf of Petitioner Ken Salazar, the United States focuses its argument on the question of whether Mr. Buono suffers an injury sufficient for Article III, rightly arguing that he does not. *Amici*

supporting the petitioner offer supplemental points regarding the first prong of the standing analysis.

However, the second prong of the standing inquiry, traceability, is more deserving of this Court's examination. While this Court should and must inquire into whether Mr. Buono has suffered an Article III injury, a consideration of traceability is also necessary.

Assuming *arguendo* that Mr. Buono suffers from an injury-in-fact, such injury is no longer fairly traceable to the federal government. It is instead fairly traceable only to the respondent's own actions in obtaining a court order to prevent the granting of relief. Any remaining injury is likewise deficient for Article III purposes.

This Court should explore the traceability issue to clarify this point of law. The exception to the general rule from *Frothingham* v. *Mellon* barring taxpayer standing, an exception originating in *Flast* v. *Cohen* for Establishment Clause suits, is an anomaly that has not been fully explicated by this Court. With the most recent treatment of this exception in *Hein* v. *Freedom From Religion Foundation*, there are many questions regarding the scope of the *Flast* exception, and lower courts require guidance on this issue. Mr. Buono's case provides an ideal vehicle for such guidance.

Mr. Buono's alleged injury is not fairly traceable to the defendant. Mr. Buono's "injury" was that taxpayer funds were supporting the Latin cross atop Sunrise Rock in the Mojave National Preserve ("Mojave cross"). Mr. Buono sought and obtained an injunction to bar the transfer of the cross to a private party, the Veterans of Foreign Wars ("VFW"), in a

land exchange for a parcel of VFW-owned land resulting in no loss to taxpayers.

First, the his action in obtaining this injunction constitutes an intervening act, such that his injury is no longer traceable to any official or subdivision of the Interior Department in any manner that can be characterized as "fair." Instead, Mr. Buono's injury is fairly traceable to his own actions.

Second, his injury cannot be traced to the statutory provision authorizing the transfer. This provision is not an exercise of power under the Tax and Spending Clause. Therefore it does not qualify for the *Flast* exception.

Another reason *Flast* does not apply is the separation of powers. This Court has set forth special concerns for the separation of powers where *Flast* is involved. As this case now continues after the elected, coequal branches have taken extraordinary measures that would have fully resolved this situation, separation-of-powers concerns naturally arise from the judiciary nullifying those efforts.

For these reasons, this injury is beyond *Flast*. Outside the *Flast* exception, it falls within the general rule barring taxpayer standing.

Beyond those reasons pertaining only to Establishment Clause taxpayer standing, there are broader constitutional implications and policies that would be contravened by finding standing in this case. The nature and purpose of standing doctrine would be violated, as these entail a limited role for the judiciary in our democratic society, and would be in derogation of interbranch relations.

Judicial resolution is entirely unnecessary here because everything has been done to provide Mr. Buono will the relief he sought. Not only should Mr. Buono not have standing, this case itself should now be moot and beyond the purview of the courts.

Further, finding that Mr. Buono retains standing would lead to the misappropriation of judicial power. All steps had been taken to grant Mr. Buono relief, and the political branches had crafted a solution providing this relief while preserving the war memorial at issue. This solution involved interbranch coordination and cooperation with the private sector. To allow a plaintiff to set all of that to naught by insisting that judicial power be exercised to provide a result beyond the long-requested relief—in this case, the result being the destruction of the memorial, would be an improper use of judicial power.

Finally, finding that Mr. Buono has standing would waste scarce judicial resources. A solution had been not only offered, but actually enacted and was underway, when Mr. Buono secured an injunction to stop the granting of relief and bring this matter back into court. The judiciary has already expended more than enough resources on this matter, and it should have been fully resolved by now. To further involve the courts when such involvement is not only unnecessary, but actually prolongs the original controversy and prevents its resolution, is an utter waste of court resources.

For all these reasons, Mr. Buono lacks standing. This Court should therefore hold that Respondent Buono lacks standing, vacate the judgment below, and remand for dismissal.

ARGUMENT

Respondent Frank Buono lacks standing to continue with the instant case. Respondent argues that the fact that the Latin cross atop Sunrise Rock in the Mojave National Preserve (the "Mojave cross") continues to sit upon public land violates the Establishment Clause, U.S. Const. amend. I, and that he has standing to pursue this case. "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis* v. *FEC*, 128 S. Ct. 2759, 2768 (2008) (citation omitted). These elements comprise the constitutional minimum for a plaintiff to satisfy the Article III case-or-controversy requirement. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing U.S. Const., art. III, § 2, cl. 1). As a general rule, taxpayers cannot assert as a justiciable injury that taxpayer money is being spent in any particular manner. *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923). An exception to this general rule where Establishment Clause claims are asserted was created by *Flast* v. *Cohen*, 293 U.S. 83, 104 (1968).

Petitioner Ken Salazar and *amici* offer persuasive arguments as to why no such injury exists. But regardless of whether such an injury exists, any such injury is no longer fairly traceable to the defendant's challenged actions, thereby precluding the possibility that Respondent Buono has standing. To find that Respondent Buono has standing under the current circumstances would not only be inconsistent with this Court's precedents, it would also violate the nature and purposes of

standing doctrine as this Court has explained them. Since Respondent Buono lacks standing, this Court should so hold, and order this case dismissed for lack of jurisdiction.

I. Assuming *arguendo* that an injury-in-fact exists, and regardless of whether it does, the injury is no longer fairly traceable to the defendant because the plaintiff's intervening actions negate traceability.

Given that the United States and *amici* have argued at length that there is no justiciable injury in this case, the American Civil Rights Union agrees that no such injury exists without discussion. But assuming *arguendo* that there is a justiciable injury, it would no longer be traceable to Defendant Salazar because Plaintiff Buono's securing of the most recent injunction destroys any such traceability. Without traceability, Mr. Buono lacks standing.

The importance of the standing issue in the instant case cannot be overstated. "The term 'standing' subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge College* v. *Americans United*, 454 U.S. 464, 471 (1982) (citing *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). Standing is "not merely some troublesome hurdle to be overcome ... so as to reach the 'merit's of a lawsuit which the party desires to have adjudicated . . . ." *Id.* at 475. This Court has made abundantly clear that it is not "the business of the federal courts [to correct] constitutional errors," *Id.* at 489, and therefore that the standing inquiry is not flexible whenever it becomes inconvenient. *Id.* As this Court stated in *Valley Forge*, so too it can be

said of the Ninth Circuit here, that for the reasons explained below the "Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing." *Id.* at 288.

Alleged injuries that amount to violating a private right to a government that does not establish a religion is insufficient to satisfy Article III standing requirements. *Id.* at 482–83, 489–90 n.26. As explained in detail below, certain criteria must be met for the *Flast* exception to the general bar on taxpayer standing to apply. As is often the case with cases asserting an injury involving the Establishment Clause, this case "falls outside the the [*sic*] narrow exception that *Flast* created to the general rule against taxpayer standing established in *Frothingham*." *Hein* v. *Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2568 (2007) (quoting *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988)) (internal quotation marks omitted).

A. This Court should address the question of traceability regardless of whether Respondent Buono has suffered an Article III injury.

"Standing is 'perhaps the most important' of the justiciability doctrines." H. Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 465 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). As such it behooves this Court to develop all three prongs of the tripartite standing doctrine as questions relating to each of those prongs properly present themselves. This Court would do well to illuminate the constitutional deficiencies with the "injury" that Respondent Buono alleges. However,

the constitutional objections raised by the second standing prong—traceability—are clearer and starker, and thus more deserving of this Court's attention.

This Court will provide useful guidance to the lower courts by expressly holding that traceability is lacking here. The lower courts are dependant on this Court's guidance. *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 555 (2008) (Thomas, J., dissenting); *see also James* v. *United States*, 550 U.S. 192, 210 (2007). Rather that focusing on the relatively close questions of what constitutes an Article III injury under *Flast* and its progeny, this Court can clearly circumscribe the limits of *Flast* by examining traceability. Recent develops in this case compel the conclusion that any injury cannot fairly be traced to federal action.

The doctrine of taxpayer standing for Establishment Clause claims is currently in a state of flux that requires explication and clarification by this Court. *See* K. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J.L. & Pub. Pol'y 219, 274–76 (2008). Since standing is such a significant issue for the judiciary, and matters touching upon religion are of such importance to many millions of Americans (on both sides of the issue), uncertainty regarding the anomalous Establishment Clause exception to *Frothingham* do a disservice to the courts and to potential litigants. Further development of this doctrine is therefore essential.

It is the significance of standing that requires this development, as it goes to the core of the Article III case-or-controversy requirement. "No principle is more fundamental to the judiciary's proper role in

our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (citations omitted). As each of the three prongs of the standing framework serve to define a "case" or "controversy," all three should be more fully developed in the *Flast* exception, not just the first.

The traceability prong should be explored in this case. The party asserting federal jurisdiction has the burden of establishing all three standing elements. *Lujan*, 504 U.S. at 561. Although Mr. Buono devotes much of his argument in an attempt to show that he has suffered an injury sufficient for Article III standing, the arguments set forth in his briefs in the court below do not carry his burden with respect to traceability.

Even if such traceability was present at the outset of this litigation, Mr. Buono must explain why his injury continues to be fairly traceable to the defendant after Mr. Buono procured an injunction to prevent the land exchange. All standing elements must be supported in each stage of litigation by evidence, as the plaintiff bears an ongoing burden to establish standing. *Id.* at 561. Even if a viable claim exists at the outset of litigation, the suit ceases to be a justiciable case if it ceases to satisfy the Article III case-or-controversy requirement at any stage of the litigation. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997). This Court has recently applied this rule with respect to ripeness, *see id.* at 68 n.22 (citation omitted), and so this requirement must apply with equal force regarding Respondent Buono's standing, as standing is another component of the case-or-controversy requirement. Therefore as the facts and procedural posture of a

case change, the plaintiff must successfully establish why each of the elements of the standing inquiry remain satisfied.

This Court should therefore consider traceability. Supreme Court precedent does not dictate that each of the standing elements must be taken in order. It also does not require that a given element must be satisfied for the following elements to be considered. For the reasons given below, traceability is the standing element most clearly lacking here. Also as set forth below, several judicial policy implications would be contravened by finding traceability in a case such as this where the plaintiff himself has acted to prevent the granting of the requested relief. For all these reasons, this Court should fully address the question of traceability.

B. Respondent Buono's injury is no longer fairly traceable to the defendant's challenged action.

The respondent's own action of obtaining an injunction to prevent the land transfer negates the possibility that his injury is fairly traceable to Secretary Salazar or any subdivision of the Interior Department. The second prong of the constitutional standing analysis requires a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of a third party not before the court." *Lujan*, 504 U.S. at 560 (quoting *Simon* v. *E. Ky. Welfare Org.*, 426 U.S. 26, 41–42 (1976)) (internal quotation and editing marks omitted). Further, this Court has held that the requisite

causal connection can turn on conduct other than the defendants'. *See id.* at 562. This is consistent with the concept that constitutional elements of standing can be defeated by the "unfettered choices" of parties other than the defendant. *See id.* at 562 (quoting *ASARCO* v. *Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion of Kennedy, J.)).

If the actions of a third party can defeat traceability to the defendant, then *a fortiori* the actions of the complaining party must defeat traceability when those actions continue an injury that would otherwise long since have ceased to exist. The most evident reason that the actions of a third party can defeat standing would be that, even if there was still an injury and the likelihood of redressability, the complained-of injury could no longer be fairly traced to the defendant. A third party neither asserts that it has been harmed, nor is the focus for the harm done to others. If such a third party can negate traceability, then the reasoning is all the stronger that it is possible for a plaintiff to take actions that would likewise defeat traceability.

This should extend to all standing inquiries, regardless of any exception to general rules that otherwise apply to special circumstances such as the *Flast* exception. The *Flast* exception to the bar on taxpayer standing, *see Frothingham*, 262 U.S. at 488, created by *Flast* v. *Cohen*, 293 U.S. at 104, does nothing to diminish this Court's pronouncement that to have standing to enjoin a federal statute, a plaintiff must sustain an "injury as the result of its enforcement." *Doremus* v. *Bd. of Educ.*, 342 U.S. 429, 434 (1952) (quoting *Frothingham*, *supra*, at 488). Here, the alleged injury is being perpetuated by the plaintiff's action to prevent enforcement of the

statute, rather than by its enforcement, which ironically would eliminate the alleged injury. Therefore it is not the enforcement of the statute, but rather the lack of enforcement, that is causing the injury. And the sole reason that the statute is not being enforced is that Respondent Buono obtained a court order enjoining that enforcement.

This violates the entire rationale of standing, per the standard tripartite inquiry. Even though the injury in question may have been caused in the first instance by the defendant, it is no longer fairly traceable to the defendant's challenged conduct. Instead, the continuance of the injury is now traceable to the plaintiff's own conduct. Although an injury persists, Mr. Buono's actions are an intervening force whereby the traceability to the defendant is no longer "fair." Mr. Buono's securing an injunction, therefore, results in the second prong of the standing inquiry no longer being satisfied.

The instant case also presents an unprecedented aspect of Establishment Clause standing for suits seeking injunctive relief. The scope of injunctive relief is limited by the scope of the injury the injunction is intended to address. *Lewis* v. *Casey*, 518 U.S. 343, 357-60 (1996). But no case considered by this Court has involved an injunction that is intended to sustain the injury is question, as is the case here.

This case even goes beyond the current divide over the reach of *Flast*, which is persuasively cited as a reason that *Flast* must be overruled. *See Hein*, 127 S. Ct. at 2573–74 (Scalia, J., dissenting). It is completely accurate to posit that injuries alleged to arise in connection with the Establishment Clause have problematically alternated between "wallet

injuries" and "psychic injuries." *See id.* at 2574–75. But this case does not even concern that divide, as the injury which Respondent Buono cites is not fairly traceable to any expenditure of congressional funds, whether itemized in the federal budget or not. Therefore this Court is able to dispose of the instant case without revisiting the anomalies of taxpayer standing vis-à-vis the Establishment Clause. It would do nothing to call *Flast* into question if this Court were to hold that a plaintiff's securing an injunction to prevent the elimination of his Article III injury precludes fair traceability.

While an injunction in cases that reach this Court often involve spending would have redressed an injury, *cf. DaimlerChrysler* v. *Cuno*, 547 U.S. 332, 348 (2006), the injunction that Mr. Buono instead sought—and received—was an injunction against an action that would have *stopped* the complained-of spending, thereby securing the very redress that Mr. Buono originally sought. This injunction was bizarrely an injunction to prevent the very relief that Mr. Buono claimed to be seeking. Since this complained-of spending was the only basis for jurisdiction *ab initio*, securing an injunction to perpetuate that very same spending pushes Mr. Buono's already-tenuous claim of standing past the breaking point.

Mr. Buono's injury is therefore no longer fairly traceable to government action.

C. The only injury alleged by Respondent Buono that can be fairly traced to government action is not one that satisfies *Flast* because it does not arise from the Taxing and Spending Clause.

This Court has never read the *Flast* exception to the bar on taxpayer standing broadly. Indeed, if anything, this Court has narrowed the exception in the intervening years. A plurality of this Court has recently stated that "[i]t is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts." *Hein*, 127 S. Ct. at 2568–69 (plurality opinion). Respondent's case provides another such opportunity.

Key to respondent's claim to have standing under *Flast* is that the statute he challenges that authorizes the land transfer at issue is an appropriations statute, Pub. L. No. 108–87, § 8121(a)–(e), 117 Stat. 1100. Such statutes are generally predicated upon the Tax and Spending power. *See* U.S. Const. art. I, § 8, cl. 1. Mr. Buono's alleged injury simply cannot be fairly traced to a federal action involving the Taxing and Spending Clause. As a plurality of this Court recently said, "[c]haracterizing this case as a . . . challenge to [a] general appropriations statute[] would stretch the meaning of that term past its breaking point." *Hein*, 127 S. Ct. at 2567 (plurality opinion) (internal quotation marks omitted). Although the context of that statement was markedly different from the facts of this case, the same reasoning holds that the relationship of the challenged act—here, the transfer of land with no financial impact—to congressional spending power is too attenuated to trigger the *Flast*

rationale of the Establishment Clause entailing an implicit spending limitation. The land transfer is sufficiently removed from any actual congressional spending that it is outside any exception to *Frothingham* that this Court could properly characterize as "narrow." It therefore "lacks the requisite 'logical nexis' between taxpayer status 'and the type of legislative enactment attacked.'" *Id.* at 2568 (quoting *Flast*, 392 U.S. at 102). Lacking such a nexus, this transfer cannot fall under the ambit of *Flast*.

Therefore the only government action that Respondent Buono's alleged injury is fairly traceable to fails to satisfy the *Flast* exception. "*Flast* limited taxpayer standing to challenges directed only [at] exercises of congressional power under the Taxing and Spending Clause." *Hein*, *supra*, at 2566 (plurality opinion of Alito, J.) (quoting *Valley Forge*, 454 U.S. at 479) (internal quotation marks omitted) (brackets in original). The challenge here is not traceable to any such invocation of the Taxing and Spending Clause. Instead, by default this transfer of property would occur through the Property Clause, U.S. Const. art. IV. § 3, cl. 2. Just as this Court found the injury in *Valley Forge* insufficient for standing because it did not arise from an exercise of the Taxing and Spending power, *see Valley Forge*, 454 U.S. at 479, so too the only injury that is fairly traceable to the defendant's action likewise arises from a provision other than the Taxing and Spending Clause. Since the *Flast* exception does not extend to the Property Clause, it cannot confer standing.

Nor can respondent claim that there is an implicit Tax and Spending Clause element in this

transfer. Respondent could claim that the value of any property relinquished by government constitutes a loss of wealth by the government, which would be of the same net affect to the U.S. Treasury as an expenditure. This would be analogous to spending and therefore might fall under the Tax and Spending Clause. But here, the exchange of an equal value parcel of land results in a zero net-sum financial impact. Therefore even if Respondent Buono's injury would be traceable to the transfer, it would still fail under *Flast* to be sufficient for standing.

Such an understanding of the limits of *Flast* would be consistent with how lower courts have understood this Court's most recent encounter with the *Flast* exception. Circuit courts have understood this Court's decision in *Hein* to clarify that only clearly itemized congressional appropriations qualify for the *Flast* exception. *E.g.*, *Laskowski* v. *Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) ("[W]e read *Hein* to mean that taxpayers continue to have standing to sue for injunctive relief against specific congressional appropriations alleged to violate the Establishment Clause, but that is all."). Since it is "a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic," *Hein*, 127 S. Ct. at 2571 (Kennedy, J., concurring), this Court should apply that principle in the same manner it was applied in *Hein* to reach the same conclusion: the plaintiff lacks standing to bring this suit.

D. The *Flast* exception does not extend to matters that raise serious separation-

> **of-power concerns, as the current case does by insisting on judicial interference with a matter otherwise resolved by the coequal elected branches.**

This Court has indicated that the *Flast* exception should not be applied when doing so would "raise serious separation-of-power concerns," *Hein*, 127 S. Ct. at 2569 (plurality opinion), and that *Flast* itself "gave too little weight to these concerns." *Id.* This case potentially presents one of the most significant such separation-of-power concerns since *Flast*. Through the four rounds of litigation over this issue, Congress has enacted statutes to eliminate the alleged injury that the Mojave cross inflicts on Mr. Buono, and the Interior Department has sought to carry out these statutory directives. Then Mr. Buono persuaded the lower courts in this case to intervene yet again, enjoining this course of action that was sanctioned by both—not merely one—of the coequal branches of government, frustrating the political solution the coordinate branches had formulated.

Nothing derived from *Flast* or its progeny can save the standing question from this separation-of-powers issue. Even assuming *arguendo* that the Establishment Clause expresses a concern that conscience not be compromised by government spending in support of religion, *Hein*, *supra*, at 2572 (Kennedy, J., concurring), the accompanying admonition that the *Flast* exception "must be interpreted as respecting separation-of-powers principles," *id.*, compels the conclusion that standing cannot be taken to the lengths necessary for Mr. Buono to maintain the injunctive action here at bar.

Congress and the administration have gone to extraordinary lengths to transfer the cross in the Mojave National Preserve to private hands, in an exemplary display of the political branches finding a resolution to a constitutional dispute. In response to such measures by the federal government, Mr. Buono responds by obtaining a court order to forbid this solution from being implemented. It is difficult to imagine a scenario with a clearer separation-of-powers aspect.

Were Mr. Buono to succeed, it could open the floodgates to similar litigation. To find Respondent Buono has standing to pursue this matter after he secured an injunction to prevent the granting of his originally-sought relief would set a precedent that would "lead to judicial intervention so far exceeding traditional boundaries on the judiciary that there would arise a real danger of judicial oversight" of coequal branches. *Hein*, *supra*, at 2573 (Kennedy, J., concurring). Courts "must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way" coequal branches perform their duties. *Id.* Separation-of-powers concerns counsel against finding standing in cases that seek to compel coequal branches to abandon a specific course of action to fulfill their duty in favor of another approach preferred by a plaintiff. *Id.*

Yet that is precisely the case here. The actions taken by the elected branches would have given Mr. Buono the relief he claims to seek. The Mojave cross would no longer be on public land. But rather than simply allow the cross to continue existing on private land, Respondent Buono seeks to bar the elaborate and thoughtful actions of the political branches from

being enacted, and claims standing to force the courts to compel a course of action that will destroy the cross. It is therefore not an end to taxpayer support for the cross that Mr. Buono seeks, but rather to employ judicial power to compel the executive branch to destroy this war memorial. Standing doctrine should not be construed to empower plaintiffs to use the courts to convert the executive branch into a demolition crew that levels crosses to the ground.

This argument is on point here under this Court's precedents. This concern of separation-of-powers is specifically tied to traceability. *Hein*, *supra*, at 2573 (Kennedy, J., concurring) (citing *Allen*, 468 U.S. at 761 n.26). It should therefore follow that the *Flast* exception does not apply in the instant case. And outside the "narrow" safe harbor of *Flast*, there is no precedent that even remotely suggests Mr. Buono has standing, and a consistent body of case law to the contrary.

II. Finding this suit to comport with Article III requirements with traceability so much in doubt would be inconsistent with this Court's precedents regarding the nature and purpose of standing doctrine and waste scarce judicial resources.

Once any alleged injury is not fairly traceable to the defendant, seeking judicial power to order the dismantling of this memorial would merely be "predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Valley Forge*, 454 U.S. at 482–83 (quoting *Fairchild* v. *Hughes*, 258 U.S. 126, 129

(1922)) (internal quotation marks omitted). Such a distinction delineates a limit that even *Flast*, which stood expansively on the outermost limit of this Court's standing jurisprudence, declared beyond the constitutional scope of judicial power, as it would "employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Flast*, 392 U.S. at 106. Finding that Respondent Buono has standing under such circumstances violates the underlying rationales of standing doctrine.

A. The nature and purpose of the case-or-controversy requirement, as represented in the standing inquiry, would be contravened by a finding that Mr. Buono retains standing to continue this case.

The constitutional scheme of our tripartite government denotes a role for the judiciary that is limited in certain respects. "The judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge*, *supra*, at 471. The Article III elements limit judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought capable of resolution through the judicial process." *Id.* at 472 (quoting *Flast*, 392 U.S. at 97).

This Court must also be cognizant of how the exercise of judicial power can impact interbranch relations with the coequal political branches of our tripartite government. *Id.* 473. The Constitution

narrowly confines judicial power to what the proper role of the courts is in a democratic system. *See Lujan*, 504 U.S. at 560 (quoting *The Federalist* No. 48 (J. Madison)). Cases such as the instant case are particularly problematic. One private individual sought a particular relief. During multiple rounds of litigation the federal government cooperated both between the branches and with the private sector (the Veterans of Foreign Wars) to enact and administer legislation to provide this result that only Mr. Buono sought, regarding whether the title of a plot of desert ground upon which a multi-generational war memorial stood was held by a public, versus private, entity. Having accomplished all this, a district court then asserts that these elaborate measures are somehow inadequate, and a circuit court affirms. Such an injunction seems sufficient to aggravate relations between the coequal branches.

The question of standing is even more significant when, as here, a plaintiff seeks "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *ASARCO*, 490 U.S. at 613 (plurality opinion of Kennedy, J.). Any observer of the Mojave cross suffers the same "injury" as Mr. Buono. This has nothing to do with an activity occurring at respondent's child's school, or the graduation ceremony at a particular high school, or a specific group on a college campus being denied access to facilities or a particular after-school group being denied recognition. This is simply a passive monument sitting on a rock in the desert, as it has for decades, silently standing as a memorial to those who sacrificed for this nation almost a century

ago. Such facts call for an especially searching inquiry to determine whether that single, unaffected citizen can invoke the power of this Court to override the judgment of Congress and the president in fashioning a way to remove the offence without dismantling this monument.

It is for precisely such facts that the Article III standing requirement exists. The constitutional "doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). Suffering an injury that is fairly traceable to a given defendant is an essential part of that identification, a task that the plaintiff must perform. Plaintiffs bear the "burden to establish standing by demonstrating that, if unchecked by litigation, the defendant's allegedly wrongful behavior will likely . . . continue." *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (opinion of Ginsburg, J.). But in this case the exact opposite is true. Without standing, this "wrongful behavior," if that is what this memorial sitting in the Mojave National Preserve is by continuing to passively sit there, would cease to sit on public land. Far from this behavior likely continuing, it would instead certainly cease.

B. Judicial resolution is entirely unnecessary in this case because, but for Mr. Buono's obtaining an injunction

to prevent the land transfer, this case would already be moot.

Mr. Buono's actions in obtaining an injunction are now the proximate case that the instant case is before this Court. Respondent Buono attempts to retain standing by preventing the case from becoming moot. If the transfer had not been enjoined, then this case would already be moot.

Mootness and standing serve related functions in this case. Although it is true that a defendant's voluntary cessation of challenged behavior does not necessarily render a case moot, *Friends of Earth*, 528 U.S. at 189 (citation omitted), because such a cessation can be a ploy to evade judicial resolution, *see id.* (citations omitted), the termination of such behavior can render a case moot if the defendant demonstrates that it is "absolutely clear" the challenged action is unlikely to recur. *Id.* (citation omitted). It is undisputed that if the injunction issued by the district court were dissolved due to the case being dismissed, then the Mojave cross would soon cease to be on public land. The case would then be doubly nonjusticiable in that the plaintiff would have no standing and the case would be moot. Both doctrines would resolve this controversy, and do so in a manner that is less disruptive than continuing to adjudicate the matter.

C. Finding standing under these circumstances would permit a private party to misappropriate judicial power.

By seeking and procuring an injunction to prevent the transfer of the memorial into private hands where it would no longer receive even *de minimis* taxpayer support, and thereby force the hand of the executive branch to dismantle (*i.e.*, destroy) the Mojave cross, Respondent Buono is essentially asserting a personal right to have the government act in accordance with his views of the Constitution. On at least three occasions, this Court has expressly rejected the existence of, or attempt to assert, any such "right." *See, e.g., Valley Forge*, 454 U.S. at 484 (citations omitted). The federal courts do not exist to become any person's wrecking ball to impose a particular agenda, which would be the outcome if Mr. Buono is found to have standing to continue this case.

This Court has stated the importance of rejecting attempts to misappropriate judicial power to be a vehicle to advance the interests of parties that lack standing. *Valley Forge, supra*, at 473. Such is the case here, where the matter has all but been resolved. The current facts of this case demonstrate the purpose of the traceability aspect of standing. As explained above, the injury, if injury it is, is no longer traceable to the government. Judicial exertions are thus constitutionally improper at this point to force a particular outcome, because the complained-of government has now acted to accommodate the plaintiff's wishes. To treat this matter as worthy of additional court proceedings at this point would be troubling to the concept of the proper application of judicial power as this Court's standing case law explains that concept.

This suit, arising from Mr. Buono's "purely psychological displeasure," *see Hein*, 127 S. Ct. at

2582 (Scalia, J., dissenting), that this Latin cross sits atop government land, takes an astounding turn when Mr. Buono sought and obtained the injunction barring the land transfer. Although Respondent Buono originally sought the balm of judicial relief to salve his "injury" of observing this cross on public land, he evidently then falls prey to an acute onset of masochism when, standing on the very brink of receiving his relief by the transfer of this memorial off the public dole and into private hands, he rushes to the courthouse to secure an injunction that prevents the granting of the very same long-sought remedy which he claims is commanded by the Constitution. One must ask whether Mr. Buono might then be seeking something other than the relief of having this cross no longer held in public hands. Should that be the case, it would seem that the only alternative is that the respondent instead seeks to have this faith-implicating memorial destroyed.

Assuming *arguendo* that the latter is correct, this Court must then confront whether it wishes to allow the *Flast* exception to facilitate private persons using the power of the federal judiciary to advance their own private, anti-religious passions when so much has been done to provide them with the relief they originally claimed to be seeking in good faith. This Court has warned and guarded against being thus manipulated. And as well this Court should, because such "accusations of manipulation . . . only weaken this Court's efficacy . . ." Elliot, *supra*, at 501. In the same manner in which this Court has commented on the injury prong of the standing inquiry, finding Mr. Buono's "injury" fairly traceable to the government here "would create the potential

for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

To do so in the context of this case would also be inconsistent with what this Court has long said about the place of faith in our nation: "We are a religious people whose institutions presuppose a Supreme Being. . . . [Therefore] we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence." *Zorach* v. *Clauson*, 343 U.S. 306, 313–14 (1952). If the Constitution does not task this Court with throwing its formidable weight against even *widening* the scope of religious influence, then surely it follows *a fortiori* that this Court need not find the respondent has standing to procure the destruction of this memorial to diminish any religious influence, and in so doing impede the extraordinary efforts of the elected branches in transferring this memorial, dedicated to our fallen heroes and quietly acknowledging the faith of many of them, to a private organization devoted to giving our servicemen the honor their memory is due.

D. To allow cases such as the instant case to proceed under these circumstances wastes scarce judicial resources.

The final judicial policy violated by finding standing here would be the waste of judicial resources. Holding that Respondent Buono lacks standing will help discourage the improper use of judicial power to push a generically anti-religion agenda, conserving scarce judicial resources.

Standing doctrine functions to ensure that scarce judicial resources are reserved for cases wherein the plaintiff has a concrete stake. *Friends of Earth*, 528 U.S. at 191. The federal docket is already burdened, and the judicial power is not designed to invite every conceivable dispute. The judicial power of Article III "is legitimate only in the last resort, and as a necessity in the determination of [a] real, earnest and vital controversy." *Valley Forge*, 454 U.S. at 471 (citation omitted).

That is especially the case where a plaintiff seeks to have the courts supersede the actions of the elected branches. Invalidating an Act of Congress is to be only a "tool of last resort" for federal courts. *Id.* at 473–74 (referencing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). A statutory provision being enacted specifically to resolve an issue is the epitome of political responsiveness. Far from judicial power being the "last resort" for Mr. Buono to secure relief, it is instead utterly unnecessary. Standing doctrine should recognize this reality in a case such as this.

The standing question becomes even more problematic for Respondent Buono because this suit seeks injunctive relief. If this were a suit for damages, respondent might continue to have standing to seek redress (assuming *arguendo* that certain other standing requirements are met). However, in this suit for injunctive relief, the government has already acted to grant Mr. Buono

the relief he claims to seek. It is Mr. Buono who has affirmatively acted to block that relief, suggesting that the injury whereby respondent claims offense is not what motivates this suit. What Mr. Buono seeks is not simply that the Mojave war memorial should no longer stand on land that is public or be under the maintaining care of National Park Service employees. As already noted, that result would have been achieved but for respondent's actions and this case would have become moot.

Rather, if Mr. Buono succeeds before this Court it would set a precedent by which federal courts continue to hold cases for further proceedings even though all actions have been taken to eliminate any injury whereby the plaintiff could even claim standing, cases which only continue because the plaintiff seeks court orders to enjoin plaintiff's originally-requested relief from being granted. To allow such a plaintiff to continue to have standing when the only reason that the plaintiff can claim a continuing injury is due to the plaintiff stopping the *elimination* of the injury unnecessarily wastes scarce judicial resources in violation of the rationale set forth by Justice Ginsburg in *Friends of Earth*, 528 U.S. at 191. Indeed, such a finding of standing would seem perverse.

The injury in the instant case is essentially now one of the Mr. Buono's own making, self-inflicted by his actions to prevent the government from complying with his original demand. This Court can grant Mr. Buono the ultimate relief he originally sought by denying standing, thereby dissolving the district court's injunction and allowing the transfer of the memorial to the VFW.

Such an outcome would conserve judicial resources. An injunction is not only intrusive to the parties; it is burdensome to the judiciary because it requires a court's continuing superintendence of a matter. *Id.* at 193. In other words, it consumes scare judicial resources, and should therefore be allowed only when necessary.

Respondent may argue that abandoning a case at an advanced stage to conserve judicial resources may prove more wasteful than frugal. *See id.* at 192. However, the opposite is true here. Allowing suits to proceed under circumstances where the plaintiff seeks to force the judiciary to continue with a suit when a resolution has already been secured that fully redresses plaintiff's alleged injury, and the plaintiff enjoins the granting of such complete relief for whatever purposes not set forth in the pleadings, invites the unnecessary waste of judicial resources in multitudinous lawsuits that could then be brought in lower courts under such a precedent by this Court. Conversely, should this Court hold that such a plaintiff no longer has standing when the only remaining injury is one that the plaintiff insists on continuing to suffer to unnecessarily prolong judicial proceedings, such a holding would not only conserve judicial resources in this case but would set a precedent that could likewise conserve resources in future cases.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be

vacated and the case should be ordered dismissed for lack of jurisdiction.

Respectfully submitted,

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June 8, 2009

AMICUS CURIAE BRIEF

No. 08-472

IN THE
SUPREME COURT OF THE UNITED STATES

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,

PETITIONERS,

v.

FRANK BUONO,

RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF AMERICAN HUMANIST ASSOCIATION, THE AMERICAN ETHICAL UNION, ATHEIST ALLIANCE INTERNATIONAL, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR STUDENT ALLIANCE AND SOCIETY FOR HUMANIST JUDAISM IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

This *amici curiae* brief in support of the Respondent is being filed on behalf of the American Humanist Association, The American Ethical Union, Atheist Alliance International, Military Association of Atheists and Freethinkers, Secular Student Alliance and Society for Humanistic Judaism, comprising a diverse array of secular and religious organizations that advocate religious liberty and offer a unique viewpoint concerning the history of religious freedom in the United States of America.

Amici feel that this case addresses core Humanist concerns about the use of inherently religious symbols as memorials on public lands. Many of *amici's* members who visit city, state and federal parks are especially concerned about the outcome of this case. *Amici* wish to bolster the principle of separation of government from religion in order to prevent their own disenfranchisement as well as to best preserve religious liberty in America.

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[1] *Amici*, identified in Appendix I, file this brief with the consent of all parties. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

SUMMARY OF ARGUMENT

The Establishment Clause[2] prohibits the federal government from advancing religion, either by preferring one religion over another or by preferring religion over nonreligion.[3] The presence of the Sunrise Rock cross on public property in the Mojave National Preserve (the "Preserve") violates both prohibited preferences.

Congress intentionally violated these constitutional commands when it passed legislation authorizing the transfer of ownership of the land beneath the cross to a private party with full knowledge that there was an existing court order requiring removal of the cross. The sole purpose of Congress's act was to maintain the religious symbol

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[2] U.S. Const., amend I ("Congress shall make no law respecting an establishment of religion . . .").

[3] *See Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."); *Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no religious favoritism among sects or between religion and nonreligion."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."); *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'" (quoting *Epperson*, 393 U.S. at 104)).

of the dominant religion in the United States and thereby cast as outsiders persons of other religions and of no religion.

The People of the United States are entitled to strict adherence by their branches of government to the letter and spirit of the Establishment Clause, which prohibits government endorsements of religion. Accordingly, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

I. THE COURT HAS LONG RECOGNIZED THAT A PARTY WHO HAD UNWELCOME CONTACT WITH AN INHERENTLY RELIGIOUS SYMBOL ON PUBLIC PROPERTY (OR UNDER GOVERNMENT CONTROL) HAS STANDING TO CHALLENGE THE DISPLAY AS A VIOLATION OF THE ESTABLISHMENT CLAUSE.

"[T]he Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (quoting *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in result and dissenting)).

In a brazen effort to save the preeminent symbol of Christianity—the Latin (Christian) cross—from removal on land owned or substantially controlled by the government, Petitioners mischaracterize Respondent Frank Buono's basis for standing, as well as the Court's holding in *Valley Forge*. In so doing, they ask the Court turn a blind eye to its Article III powers to decide cases and controversies involving the prohibitions of the First Amendment.

A. At its core, standing requires the complainant to have a "personal stake in the outcome of the controversy."

"The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In this case, the Respondent unequivocally has that "personal stake," inasmuch as he is seeking to uphold his personal right to pass through the Preserve without having to encounter governmental endorsement of Christianity.

The standing question is distinct from merits considerations, and "[i]n considering standing, we must assume the merits in favor of the party invoking our jurisdiction." *Emergency Coalition to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008); see also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). Thus, in making the standing determination, the Court must assume that

the Petitioners' actions do, in fact, violate the Establishment Clause.

Religious liberty includes the right of individuals to determine for themselves the harmfulness of a governmental religious symbol. As the Court stated in another context, "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Moreover, even if Respondent himself considered the injury to be trivial, "an identifiable trifle is enough for standing to fight out a question of principle." *United States v. SCRAP*, 412 U.S. 669, 690 n.14 (1973) (citation omitted).

B. The unwelcome witnessing of a government endorsement of religion is a "particularized" injury sufficient for standing purposes; Petitioners misstate the Court's holding in *Valley Forge*.

The Respondent has brought this action to vindicate his First Amendment right to be free from a government endorsement of religion – the direct and unwelcome contact with the preeminent religious symbol of Christianity in a government location.

Perhaps the most cited standing case in terms of a "personal injury" notion is *Valley Forge*. There, an organization "firmly committed to the constitutional principle of separation of church and State," 454 U.S. at 486, sought to invalidate the transfer of government property to a Christian college. Noting

that the property was "located in Chester County, Pa. The named plaintiffs reside[d] in Maryland and Virginia; their organizational headquarters [we]re located in Washington, D. C. They learned of the transfer through a news release," *id.* at 487, the Court held that the plaintiffs lacked standing because no plaintiff "suffered, or [wa]s threatened with, an injury other than their belief that the transfer violated the Constitution." *Id.* at 487 n.23. Article III, said the justices, does not give litigants "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

In other words, *Valley Forge* stands for the "particularized" notion reiterated ten years later in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992): "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." In this case, that criterion has definitely been met. The Respondent has been personally and individually injured because he came into direct and unwelcome contact with a religious display on government property and will either continue to have that contact when he passes by Sunrise Rock cross or will be forced to alter his behavior in order to avoid contact with the cross.[4]

A careful reading of *Valley Forge* in its entirety finds this idea to be expressed with the utmost

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[4] As a Catholic, Respondent does not view the cross itself as offensive, but in the context here finds the government's display offensive as an endorsement of religion.

clarity. Nonetheless, confusion has arisen, largely from the following passage:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.

454 U.S. at 485 (emphasis in original). Justice Rehnquist's choice of the word, "observation," was unfortunate, inasmuch as, out of context, it appears to refer to personal "observation" of specific governmental acts. Yet that is precisely what Valley Forge does *not* reference. Rather, "observation" in this passage equates to "learning by way of secondary sources" (as occurred in Valley Forge, where the plaintiffs did not personally observe the property transfer, but "learned of the transfer through a news release"). *Id.* at 487.

This understanding is corroborated by numerous cases, including the D.C. Circuit's *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 428 (D.C. Cir. 1998) (en banc) (animal welfare advocates had standing "when they *observed* primates living under [inhumane] conditions") (emphasis added) and *Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 764 (D.C. Cir. 2008) (standing exists when "religious speech [is] *observed* . . . by the plaintiffs") (emphasis

added). In fact, even the *desire* to personally observe suffices for standing, as stated in *Lujan*: "Of course, *the desire to . . . observe* an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 504 U.S. at 562-63 (emphasis added).

C. The practice of labeling injuries as "psychological" or "psychic" by persons of the dominant religion is seen by *amici curiae* as prejudicial and pejorative.

Amici feel compelled to inform the Court that our members view as condescending the use of the terms "psychological" and "psychic" to describe Respondent's injury.[5] These usages seem to infer

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[5] *See Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007) (Scalia, J., concurring) (quoting *Valley Forge*, 454 U.S. at 485-86:

> While *Valley Forge's* application of the first prong to distinguish *Flast* was unpersuasive, the Court was at least not trying to hide the ball. Its holding was forthrightly based on a resounding rejection of the very concept of Psychic Injury: "[Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the

that Establishment Clause rights of the nonreligious and other persons, including the religious, who believe that separation of church and state is the true meaning of the clause, and who suffer harm wrought by government's endorsement of religion, are not worthy of equal protection under the law.

Moreover, our members detect that meeting the "spiritual" needs of the religious is often considered by some members of the Court to be superior to meeting the "psychological" needs of the nonreligious. Yet this preference for placing one sort of mental need or interest over another doesn't find clear justification in logic, law or biology. Rather, this preference exhibits the hallmark of privilege: that deference enjoyed by those holding the dominant viewpoint. But when social privilege is set aside, offense taken at government establishment of religion, on the one hand, and offense taken at violations of religious liberty, on the other, equally constitute "mere" psychological harms.

D. *Amici* ask the Court to follow precedent.

Is direct exposure to and unwelcome contact with an inherently religious symbol on public property, as is the situation here, sufficient for Article III standing?

"In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing

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intensity of the litigant's interest or the fervor of his advocacy."

cases." *Allen v. Wright*, 468 U.S. 737, 751-52 (1984) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983). In each of the Court's four religious symbols cases—*Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monolith); *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments framed document); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (crèche and menorah); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche)—the plaintiffs had standing. Although the context is different in each case, the critical component of standing, direct and unwelcome contact with a religious symbol, is the same. Clearly, precedent favors the Respondent.

The real concern of the Petitioners and supporting *amici* is that this case—like *American Atheists, Inc. v. Duncan*, No. 08-4061 (10th Cir. pending) (Latin crosses on Utah highway rights-of-way) or *Jewish War Veterans v. Gates*, Nos. 08-56415 and 08-56436 (9th Cir. pending) (Latin cross on Mt. Soledad)—is a threat to Christian hegemony in the United States. However, as members of the Court are sworn to uphold equal justice under law, Petitioners' fears that an adverse outcome in this case will potentially have a negative outcome on these other cases should be irrelevant to the Court.

As *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), left *Flast v. Cohen*, 392 U.S. 83 (1968), where it found it for taxpayer standing,[6] *Valley Forge* and *Van Orden* left standing based on

[6] "We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it." Alito, J., Slip Opinion at 28 in *Hein v. Freedom From Religion Foundation*

direct and unwelcome contact intact. *Amici* urge the Court to affirm "unwelcome contact" standing.

II. THE NINTH CIRCUIT DID NOT ERR IN REFUSING TO GIVE EFFECT TO THE ACT OF CONGRESS PROVIDING FOR THE TRANSFER OF THE LAND TO A PRIVATE PARTY.

The court below properly identified the land exchange mandated by Congress "leav[ing] a little donut hole of land with a cross in the midst of a vast federal preserve," *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1071 (9th Cir. 2007), as merely a clever attempt by the government to evade the district court's permanent injunction enjoining the government from displaying the Latin cross on Sunrise Rock. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, *Buono v. Norton (Buono II)*, 371 F.3d 543 (9th Cir. 2004). Thus, the government's argument, that the congressional act cures the violation of the Establishment Clause, is without merit because the government retains substantial—if not nearly complete—control over the cross and property notwithstanding the land transfer.

In order for § 8121 to comply with the Establishment Clause, the government must have had "a secular . . . purpose" in conveying the land to the VFW. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). While it is true that "the Court is normally deferential to [the government's] articulation of a

secular purpose," *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987), such justifications "ha[ve] to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one." (quotation omitted)); *Edwards*, 482 U.S. at 586-87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."). Recognizing such precedent, this is the sensible approach the Ninth Circuit took in rejecting the presumption that the land transfer effectively cured the inappropriate endorsement of religion. Instead, the court respected that "[t]he Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry [into the sale]." *Buono IV*, 502 F.3d at 1082 n.13.

Although the Seventh Circuit has stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion," *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000), that court admits that "we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased," *id.*, and "look to a number of factors and determine whether the

sale effectively ended [government] action, based on the totality of the facts in the record." *Id.* at 492. Thus, it is not relevant whether this Court chooses to adopt a presumption that a land transfer to a private party is an effective way for the government to cure its violation of the Establishment Clause. In either circumstance, it is the facts of the particular case that dictate whether the land transfer actually cures the inappropriate government endorsement of religion.

An examination of the facts of this case unmistakably demonstrates that the government has a long history of control over the religious display, does not relinquish control of the cross nor the real property by virtue of the land transfer, and thus does not cure the violation of the Establishment Clause merely by transferring a relatively small portion of its land to a private party. The overwhelming evidence of the government's ongoing control over the cross, coupled with the government's religious purpose as manifested by Congress's multiple efforts at intervening to prevent the cross's removal, compel a finding that the government has violated the Establishment Clause and continues its violation by ignoring the injunction.

As the Ninth Circuit correctly identifies, the evidence is clear that the government maintains significant control over the property. The specific incidents of control include: (1) The National Park Service (NPS) is granted statutory powers under 16 U.S.C. §§ 2, 431 of "supervision, management, and control" of national memorials; (2) § 8121(a) expressly reserves NPS management responsibilities

under § 8137; (3) § 8137(a)-(c) effectively gives the government an easement or license over the property to install replicas of the original plaque and cross located at the site; and (4) the government retains a reversionary interest in the property under § 8121(e). *Buono IV*, 502 F.3d at 1083. Taken together, these facts demonstrate that despite the land transfer, the government maintains significant ongoing control over the property "requiring compliance with constitutional requirements on [the] land." *Id.* The fact that the government retains an *automatic* reversionary interest in the property if it is no longer being used as a war memorial clearly shows that, unlike a fee simple land transfer, the transfer in question impermissibly allows the government to maintain control over a religious display.

Even more damning is the evidence that the government transferred the land to the VFW specifically *because* it knew that they would maintain the cross as a religious war memorial. The decision to transfer the land was buried in an appropriations bill, did not open bidding to the general public and directs the land to be transferred to the VFW, which is the very organization that originally installed the cross on Sunrise Rock and obviously desires to maintain it. *Id.* at 1084. The unusual structuring of the transaction, "coupled with the government's selection of beneficiaries . . . [with] significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunction." *Id.* at 1085.

The land exchange itself is merely the latest step in a litany of long-standing efforts on the part of the government to maintain and preserve the cross in violation of the Establishment Clause. When a suit against the government was first brought, Congress passed § 133, banning the use of government funds to remove the cross. *Buono IV*, 502 F.3d at 1085. It was only after litigation commenced that the government tried to take a different tack in preserving the cross by designating it as a national war memorial under § 8137. *Buono IV*, 502 F.3d at 1085. When the court in *Buono I* enjoined display of the cross, Congress *again* prohibited the use of federal funds to remove any World War I memorials under § 8065(b), which conveniently included the cross as previously designated under § 8137. *Buono IV*, 502 F.3d at 1085. The government does not deny nor contest these legislative responses, *id.*, which taken together demonstrate that, not only is the most recent land transfer an attempt to circumvent the latest injunction, but that these actions are consistent with the long-standing and deliberate efforts of the government to preserve the cross atop Sunrise Rock.

III. THE LATIN CROSS ON GOVERNMENT PROPERTY IS GOVERNMENT-SPONSORED SPEECH AND VIOLATES THE ESTABLISHMENT CLAUSE.

Given that the Petitioners have failed to challenge the lower court's correct ruling that the display of the cross violates the Establishment

Clause, *res judicata* dictates that the issue not be relitigated here. However, given that the government is attempting to maintain control of the property on which the cross stands, despite the land transfer, the narrow remedy ordered is insufficient to cure the underlying violation. Thus, the real issue before the Court is the Establishment Clause itself, and how its proper interpretation undeniably exposes the government's continuing violation of it.

A. The speech of a donated permanent monument on public property is that of the government.

This term, in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009), the Court held that "the placement of a permanent monument in a public park is . . . a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Once a form of expression is concluded to be government speech, it is no longer governed by the Free Speech Clause, because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 1131. However, "[t]his does not mean that there are no restraints on government speech. For example, government speech *must comport with the Establishment Clause*." *Id.* at 1131-32 (emphasis added). This Court in *Summum* unequivocally rejected the argument that the government can hide behind the protections of the Free Speech Clause afforded to a private party just because it commissioned the monument. The court rejected such a line of reasoning several times, stating that

"[p]ermanent monuments displayed on public property typically represent government speech," *id.* at 1132; "[a] monument, by definition, is a structure that is designed as a means of expression," *id.* at 1133; "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land," *id.*; "throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity," "[t]he monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 1133, 1134.

Thus, at the latest—when government acquiesced to the presence of the cross atop Sunrise Rock (by its refusal to remove the cross at Respondent's request)—the message inherent to the monument became *government* speech that is subject to the restrictions of the Establishment Clause.

It is true that the Court goes on to state that what constitutes the "message" of a monument is by no means always clear, *id.* at 1135, and may in fact change over time. *Id.* at 1136. However, the message of the Latin cross is unequivocally religious and has been so throughout history. Therefore, the government must accept that, by displaying the cross on public land and continuing to control the monument notwithstanding the land transfer, it is unconstitutionally endorsing a symbol with an *inherently* religious message.

B. The meaning and use of the Latin cross is an inherently religious symbol of Christianity.

Webster's New American Dictionary defines a cross as "a device composed of an upright bar traversed by a horizontal one, specifically, one used as a Christian symbol." Michael E. Agnes, *Webster's New American Dictionary* (John Wiley & Sons 2004). Numerous court decisions also reference the cross as being the principal symbol of the Christian religion. See *Capitol Square v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring) (describing cross as the "principal symbol of Christianity"); *Lynch v. Donnelly*, 465 U.S. 668, 695 (1984) (Brennan, J., dissenting) (describing cross as a "distinctively religious symbol[ ]"); *Webb v. City of Philadelphia*, 562 F.3d 256, 262 (3d Cir. 2009) (referencing "religious symbols, such as cross pins"); *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 897 (9th Cir. 2008) (describing cross as "the central symbol of [the Christian] religion); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1982) (referring to the cross as a "religious symbol[ ]"); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980) (holding that city's purchase of a 36-foot high cross to commemorate the papal visit lacked "[a]t least some minimal secular purpose"); *Fox v. City of Los Angeles*, 587 P.2d 663, 670 (Cal. 1978) (en banc) ("[T]he single-barred cross is a symbol particularly pertinent to the Christian religion."); *Lowe v. City of Eugene*, 463 P.2d 360, 363 (Or. 1969) (en banc) (referring to cross as an "essentially religious symbol").

The cross has always been very significant in Christian theology and was especially important to the authors of the New Testament. The cross reminds both Christians and non-Christians of the death of Jesus Christ.

The Christian religion emphasizes the death of Christ much more than his life, activities and teachings. The Nicene Creed[7] refers to his death on behalf of humanity but makes no mention of his miracles and teaching. A person may doubt the miracles of Jesus (such as casting out demons and healing the sick) and still call himself a Christian. Similarly, a person may call himself a Christian even though he believes that some of the sayings attributed to Jesus are not genuine. But a person cannot be a true Christian if he fails to understand and be thankful for Christ's death on the cross and his subsequent resurrection from the dead. His sacrificial death on the cross and subsequent resurrection constitute the defining doctrine and primary message of Christianity.

In the Christian story Jesus died by crucifixion. This is an extremely painful form of death. It was considered remarkable that Jesus died in the same cruel way that criminals died at the hands of the Roman government. Some of those who witnessed his crucifixion mocked Jesus, arguing that if Jesus were really God's chosen son and the King of the

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[7] Joseph Willhelm, *The Nicence Creed, in The Catholic Encyclopedia*, Vol. 11 (Robert Appleton Company 1911), *available at* http://www.newadvent.org/cathen/11049a.htm.

Jews, he would come down from the cross and save himself from death. See *Luke* 23:35-37;[8] *Matthew* 27:38-42 (King James).[9] Christianity teaches that a man who did not save himself is able to save us. But this paradox is easily explained. As noted above, Jesus had to die in order to provide atonement for human sins. Another meaning related to his death is that Christians will experience pain, suffering, struggle and persecution, as symbolized by the cross. Jesus said, "[i]f any man will come after me, let him deny himself, and *take up his cross*, and follow me." *Matthew* 16:24[10] (emphasis added); see also *Mark* 8:34 (King James).[11]

Petitioners and others may try to create an *additional* and non-Christian meaning for the cross by arguing that it symbolizes the sacrifice of

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[8] "And the people stood beholding. And the rulers also with them derided him, saying, He saved others; let him save himself, if he be Christ, the chosen of God. And the soldiers also mocked him, coming to him, and offering him vinegar, And saying, If thou be the king of the Jews, save thyself."

[9] "Then were there two thieves crucified with him, one on the right hand, and another on the left. And they that passed by reviled him, wagging their heads. And saying, Thou that destroyest the temple, and buildest it in three days, save thyself. If thou be the Son of God, come down from the cross. Likewise also the chief priests mocking him, with the scribes and elders, said, He saved others; himself he cannot save. If he be the King of Israel, let him now come down from the cross, and we will believe him."

[10] "Then said Jesus unto his disciples, If any man will come after me, let him deny himself, and take up his cross, and follow me."

[11] "And when he had called the people unto him with his disciples also, he said unto them, Whosoever will come after me, let him deny himself, and take up his cross, and follow me."

veterans who have died in service to their country. But that additional meaning is subordinate to and derived from the primary Christian meaning of the cross. The Bible and twenty centuries of Christian history emphasize the religious significance of the cross, which is in no way negated by 21st century feigned ignorance of the Bible and Christian history.

If we assume that the cross at issue symbolizes the noble sacrifice of war veterans, that meaning is made possible only because of the much greater sacrifice of Jesus Christ for the benefit of mankind. The "Battle Hymn of the Republic" includes the following verse: "As He died to make men holy, let us die to make men free." The verse links the sacrificial death of a soldier on the battlefield to Jesus Christ's much greater sacrifice on the cross. Similarly, the reasonable observer in this case inevitably thinks of the death of Christ when he or she views the cross at issue, even if we assume that the cross was intended to honor war veterans.

Christianity has always been the dominant religion in the United States and the cross has always been the primary symbol of Christianity. Given these facts, it would be absurd to conclude that the cross at issue in this case has lost its Christian meaning simply because the cross might also symbolize the sacrifice of veterans.[12] The

[12] The Veterans Administration itself does not recognize the Latin cross as a universal symbol of death and remembrance. Instead, it recognizes 39 distinct religious emblems of belief to be used on government headstones and markers at the option of the next of kin or authorized representative. See United States Department of Veterans Affairs, Mar. 12, 2009,

Christian meaning of the cross is its primary meaning and any other meaning is secondary, derivative and of minimal significance.

C. The Latin cross may be a symbol of death and burial, but it is an inherently Christian symbol of death and burial rather than a secular symbol.

The Latin cross is the "principal symbol of Christianity." *Capitol Square v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring); see also *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 788 (10th Cir. 1985). The cross expresses with clarity and simplicity the Christian message that the crucifixion and resurrection of Jesus is the source of human salvation. See Holly Everett, *Roadside Crosses in Contemporary Memorial Culture* 22 (2002). Nothing inherent in the shape of a Latin cross communicates a message of death and remembrance. This symbolism is a product of the historical use of the cross in Christianity:

> The cross as an indication of death is connected with the biblical account of Jesus Christ's death and resurrection as told in the gospels of Matthew, Mark, Luke and John. Prior to the infamous execution, crosses were understood as

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http://www.cem.va.gov/hm/hmemb.asp. Of course, there is no requirement that any emblem of belief be put on a headstone or marker as would be appropriate where the decedent was nonreligious or of a religion different than the 39 approved emblems.

> threatening symbols of Roman power and punishment.

Id. at 23. It is only because the cross has been used by Christians since the Fourth Century to identify themselves and mark their place of death and/or burial that the cross conveys a message of death and remembrance for Christians today. See *New Catholic Encyclopedia*, Vol. IV, 370 (Thomas Carson et al. eds., Thomson Gale 2002).

A majority of individuals in the United States belong to Christian denominations that revere the Latin cross as a symbol of Jesus' death and resurrection.[13] Presumably this majority would view the Latin cross as a general symbol of death, as they may view the cross as a general symbol for morality, sacrifice or salvation. See *The Zondervan Pictorial Encyclopedia of the Bible*, 1038-39 (Merrill C. Tenney ed., Zondervan Publishing House 1975). As many Christians argue in the debate over separation of church and state, religious adherents often find it impossible to separate the religious aspect of their lives from the civic aspect of their lives. See, e.g., Candyce T. Beneke, *The Separation of Personal Religious Faith and Professional Identity—Is This Really Possible? Is It Truly Desirable?*, 41 S. Tex. L. Rev. 1423 (2000). Therefore, it would not be surprising to find that a majority of Americans may perceive the Latin cross to have secular importance as well as religious importance. But the fact that a

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[13] See The Pew Forum on Religion & Public Life, *The US Religious Landscape Survey* (Fed. 25, 2008), *available at* http://religions.pewforum.org/affiliations.

majority of Americans have no problem with the government's purported "secular" use of a religious symbol does not mean that that symbol is no longer religious; i.e., that it has been transmuted into a secular symbol.

Religious symbols do not become secular by virtue of the fact that they are so pervasive that even nonadherents know what the symbols signify:

> Symbolically, the cross represents physical death followed by spiritual rebirth into an eternal state of existence to *all those even vaguely familiar* with the tenants of Christianity. Thus, each marker affords the viewer a powerfully iconic moment, with spatial, temporal, and magico-religious implications.

Everett, *Roadside Crosses, in Contemporary Memorial Culture*, *supra*, at 22 (emphasis added). Therefore, even if it was proven that one hundred percent of the United States population associated the Latin cross with death, this would not turn the cross into a secular symbol. At most, this would simply prove that the cross is a well-recognized religious symbol. It is only because of Jesus' death on a cross that the cross is able to symbolize the deaths of his followers.

D. It is the unambiguously religious message of the Latin cross that makes it an effective symbol.

The determination of whether a display has the effect of conveying a message of government endorsement of religion is heavily dependent on the unique facts surrounding the display. Applying the recent Supreme Court cases of *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), the Tenth Circuit stated that "[t]he 'effect' prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1227-28 (10th Cir. 2005). The Tenth Circuit explained that analysis of a display's effect "depends in large part on the display's particular physical setting." *Id.* at 1228.

The Supreme Court has crafted a *flexible* test that is "sensitiv[e] to the unique circumstances and context of a particular challenged practice," *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring), in an effort to maintain a high degree of objectivity in a test that is subjective by definition. The flexibility of the effect-prong analysis was designed to promote decisions that are both logical and practical: "this flexibility is a virtue and not a vice." *Pinette*, 515 U.S. at 783.

In this case, the reasonable observer should be aware of the existence of two types of Latin crosses erected along local roads and highways across America: 1) small crosses, often with flowers, marking the location where an individual has died in an automobile accident and 2) large crosses intended to spread the religious message of Jesus' death and

resurrection. However, even though it may be appropriate to ascribe knowledge of the uses of Latin crosses to the reasonable observer for purposes of effect-prong analysis, this knowledge is far from "universal." In *Roadside Crosses in Contemporary Memorial Culture*, *supra*, at 117, Holly Everett wrote that several people that she interviewed "had never seen or heard of objects by the side of the road marking the site of a fatal accident." Roadside crosses are not universally recognized, and their relative obscurity can give them an air of illegality:

> The fact that roadside crosses do not register on the cognitive maps of all area residents, or civic and county site maps, further highlights their informality and liminal status. Adding to the *outlaw quality* of the markers has been the absence of concrete guidelines for governmental entities in many areas.

Id. (emphasis added).

Small, white, roadside crosses are certainly not the only crosses motorists see while driving on interstate highways. Large Latin crosses exist all across the United States *on private property* visible from the interstate. Crosses are placed in locations chosen for maximum visibility in order to capture the attention of passing motorists. Although the number of large Latin crosses bordering the highways of the United States is unknown, the number of crosses erected by one remarkable individual is known. Bernard Coffindaffer "led a

one-man crusade that erected 1,864 sets of three crosses in at least 27 states, the District of Columbia, Zambia and the Philippines."[14] The tallest crosses were twenty-two feet tall, and the smaller crosses were seventeen feet tall. These crosses were not memorials. Coffindaffer wanted to spread the religious message of Jesus' death and resurrection.[15] Even if Coffindaffer was the only person to erect

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[14] *See*, Christian Crosses, Inc., http://www.christiancrosses.org (last visited July 25, 2008).

[15] A brief history of the Bernard Coffindaffer and the erection of the crosses is available at http://www.christiancrosses.org/history. The following is a selection from that website:

> After two heart by-pass operations, [Coffindaffer] liquidated his business and two years later had a vision. "A genuine, marvelous, glorious vision," he said, "The Holy Spirit instructed, blessed, dealt with me and told me how to go about installing these crosses. It was an experience you have once in a lifetime." He was told what to do: Get manpower, materials, and plant crosses. "I worked like a dog for the money, eighteen hours a day for thirty-five years," he said. "The Holy Spirit knew I had the money and was willing to spend it, and I'm not going to back down." For the nine final years of his life, he obediently spent approximately $3,000,000 planting the clusters of three crosses in 29 states, District of Columbia, Zambia and The Philippines. Site owners donated the lands used for the crosses and Coffindaffer paid all the bills.
>
> Coffindaffer started the project on September 28, 1984, stating, "Not for saints or sinners. For everybody. They're up for only one sole reason, and that's this—to remind people that Jesus was crucified on a cross at Calvary for our sins, and that He Is soon coming again."

large Latin crosses near the highway, one could honestly say that large crosses are a common sight on America's highways. But many have followed in Coffindaffer's footsteps.

In her book, Everett described a man named Steve Thomas who "erected a 190-foot cross next to Interstate 40 as an 'advertisement for Jesus.'" *Roadside Crosses*, *supra*, at 19. A website devoted to this cross states that, "[t]en million people pass by every year."[16] Everett further noted that "Thomas planned to help others build giant crosses in Illinois and Florida." *Roadside Crosses*, *supra*, at 19. Furthermore, at the intersection of Interstates 57 and 70, there is a white, Latin cross standing 198-feet tall, which was erected by the Cross Foundation.[17] According to their website, the Cross Foundation is "dedicated to building both faith and family on an ecumenical basis," and the cross "is intended to serve as a beacon of hope to the 50,000 travelers estimated to pass the site each day." *Id.*

The existence of these larger roadside crosses across the United States is significant because of their similarity to the cross in this case. The Latin cross in this case is not comparable to the small memorial crosses that are routinely removed by highway maintenance personnel; the Sunrise Rock cross is an eight-foot tall permanent cross. If we assume that the reasonable observer is aware of the

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[16] *See* Cross of Our Lord Jesus Christ Ministries, http://www.crossministries.net (last visited July 25, 2008).

[17] *See* The Cross Foundation, http://www.crossusa.org (last visited July 25, 2008).

existence of both the small, memorial crosses as well as the larger, "advertisement for Jesus"-type crosses, Everett, *Roadside Crosses*, *supra*, at 117, it is clear that the cross in this case is of the type used to send a Christian message to motorists and visitors.

Individuals and organizations that expend time and money erecting large Latin crosses by the side of the highway do so precisely because the crosses send a religious message. *See, e.g., id.* at 19. Just as it is reasonable for a motorist to assume that a permanent cross near an interstate highway is intended to convey the religious message of the owner of the property, it is reasonable to assume that this permanent cross on government property reflects the religious message of the government. See *Pinette*, 515 U.S. at 786 (Souter, J., dissenting) ("an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.").

E. Religious symbols, and the controversy that surrounds their display on government property, impair the effectiveness of memorials to veterans.

Unfortunately, the message of remembrance and gratitude for the service of military veterans is often lost in the controversy that ensues when the government sanctions a pervasively religious symbol to serve as a memorial. The lives of the veterans commemorated by the Latin cross at issue here have been overshadowed by a debate over the proper place of religion in government. Furthermore, this Court

has been placed in the unenviable position where, in order to avoid offending those Christians who want the government to display the Latin Cross as a sincere expression of faith, the Court must deny the religious significance of the cross—a symbol with profound religious significance for a majority of Americans.

Litigation is divisive, distracting and costly, even in cases where a challenged governmental practice is ultimately upheld. One particularly telling case involves the forty-three-foot tall Latin cross on Mt. Soledad in San Diego, California. This cross has been the subject of continuous litigation since 1989 between the government and citizens who view the cross as an endorsement of religion. See *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001); *Paulson v. City of San Diego*, 475 F.3d 1047 (9th Cir. 2007); *Trunk v. City of San Diego*, 547 F. Supp. 2d 1144 (S.D. Cal. 2007); *Jewish War Veterans v. Gates*, Nos. 08-56415 and 08-56436 (9th Cir. pending).

Even if it is assumed *arguendo* that the cross on Mt. Soledad is constitutionally permissible, it is still undeniable that the religious nature of the cross has been enormously divisive. *See* Kimberly Edds, *In California, Cross Site Stirs Discord: Church-State Separation Is Issue at Mount Soledad Memorial*, Washington Post, Dec. 6, 2004, at A19. The government's attempt to characterize the Mt. Soledad cross as a veterans' memorial does not relieve tension; indeed it injects more emotion into the debate. *Id.* Now opponents of the Mt. Soledad cross are accused of lack of respect for, or even contempt for, Christianity *and* of veterans. *Id.* A

similar dynamic is present in this case, where opponents of the impermissible display of the Latin cross can be characterized as opponents of honoring fallen military veterans.

Religious symbols as memorials invariably alienate a segment of the community that was served by the fallen veteran. To those members of the community that do not share the beliefs expressed by a religious symbol, religious symbols often send divisive messages, i.e., 1) the veteran only served the members of the community that shared his or her beliefs, 2) only those members of the community who revere the religious symbol are honoring the veteran or 3) only Christian veterans are honored. The first message is unfortunate because military personnel pledge to serve the entire community regardless of religious belief. The second message is unfortunate because every member of the community should be able to feel as though he or she is honoring the fallen veteran. And the third message is unfortunate because a significant minority of all fallen veterans are Jews and other religious non-Christians or are non-religious. This message is particularly offensive to non-Christians and violates the Establishment Clause.

F. Secular memorials do not offend religious beliefs.

Although memorials with religious symbols may alienate the segment of the population that does not share those religious beliefs, the reverse proposition that secular memorials alienate the

segment of the population with religious beliefs—is not true. It is indisputable that attempts to remedy Establishment Clause violations are often interpreted by some religious adherents as "hostility" toward their beliefs, *Van Orden v. Perry*, 545 U.S. 677, 684 (2005), but these same adherents would not argue that every memorial which is not laden with religious imagery is offensive.

The most poignant and effective memorials in the United States contain nc religious symbols. Americans are not offended that, for example, the National World War II Memorial, the Vietnam Veterans Memorial and the Korean War Veterans Memorial do not contain Christian or other religious symbols. These memorials are not considered hostile toward religion because they do not have religious symbols. These secular monuments allow Americans of all belief systems to participate equally in the act of honoring and remembering veterans.

G. Those who advocate the display of the Latin cross on public property do so for religious, not secular, purposes and, to advance their legal theory, must deny the cross's historic and current religious significance.

Most Americans who support the display of the Latin cross on public property admit unapologetically that they support using the cross because of its profound religious significance.[18]

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[18] *See*, for example, Dave Tabish, the organizer of a rally protesting the filing *American Atheists v. Duncan*, No. 08-1061

However, government officials and their attorneys know that in order for the display of a Latin cross to satisfy the secular purpose requirement of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and its progeny, the government must deny the religious significance of the cross. One legal commentator, William P. Marshall, has described as a "shell game" the government's attempt to deny the religious nature of a practice in order to uphold it.

> [There are] a number of approaches in which the prohibition on state-sponsored religion may be maintained in theory while allowing significant state sponsorship of religion to remain in practice.
>
> . . .
>
> Virtually all of [these] approaches have one element in common. They minimize, if not completely deny, the religious significance of the governmental practice in question. As such, they are little more than shell games. There are elements of religiosity in all of the practices that these approaches seek to justify."

(10th Cir. pending), was quoted as saying: "We've taken god out of the school, out our council meetings and taken the Ten Commandments out of government . . . . It's time we stand up and put God back in our country." Jason Davis, *Atheists Seek to Remove Cross Memorials for Fallen Patrol Officers*, The Christian Post, Dec. 5, 2005.

The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11, 20, 27 (2002).

CONCLUSION

For the reasons that the Respondent has standing, the case is not moot and the display by government of the Christian cross on public land is a violation of the Establishment Clause, the Amici Curiae respectfully request that the judgment of the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of Humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of Humanism, raise public awareness and acceptance of Humanism and encourage the continued refinement of the Humanist philosophy.

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a Humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated in a number of amicus curiae briefs in defense of religious freedom and church-state separation.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational

thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Military Association of Atheists and Freethinkers is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and civilian community about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance is a network of over 130 atheist, agnostic, Humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States. The vast majority of the affiliates are at high schools and colleges in the U.S. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism mobilizes

people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The Society for Humanistic Judaism members want to ensure that they, as well as people of all faiths and viewpoints, will continue to feel comfortable in America's parks.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE CLERK

No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

FRANK BUONO
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a plaintiff has standing to assert an Establishment Clause claim only if the plaintiff can demonstrate that his or her religious beliefs are offended by the particular religious symbol or practice involved in the challenged government action.

2. Whether the government may cure any Establishment Clause violation based upon government ownership and display of a religious symbol by transferring to a private party the government property involved, without regard to the particular circumstances surrounding the transfer and the nature of the government's retained interest in and continuing involvement with the property and symbol.

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INTEREST OF THE *AMICI CURIAE*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Because those rights are dependent on a government that is scrupulously neutral about religion, AJCongress, since its founding, has devoted considerable attention to litigation enforcing the Establishment Clause.

The American Jewish Committee ("AJC"), a national organization of approximately 175,000 members and supporters and 26 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause, which it believes provides the most solid foundation for ensuring religious freedom for people of all faiths and of no faith. Accordingly, AJC has participated as *amicus* in a wide array of cases through the years in support of this vital principle.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been recognized that an individual has standing to assert a claim under the Establishment Clause challenging a government action that adversely affects the individual's use or enjoyment of a government park or other government

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this *amicus* brief have been filed with the Clerk's office.

facility. This Court has resolved on the merits a number of cases in which the plaintiffs' standing rested on this principle, and the lower courts have consistently upheld standing on this basis.

The government argues that this well-established principle is inapplicable here because respondent, who is Catholic, does not find crosses offensive as a matter of his own religious belief, and therefore cannot object to the government's ownership of the cross in Mojave National Preserve. But a religious person may conclude—either as a matter of religious doctrine or on other grounds—that government endorsement of her particular religion, and the resulting expropriation of her religion's symbols for government purposes, is just as offensive, or even more offensive, than government endorsement of another religion. If that offensiveness interferes with the individual's use and enjoyment of federal property, the individual has standing to sue. Indeed, the government has not pointed to a single case challenging government ownership of a religious symbol in which the plaintiff was found to lack standing because the symbol was an element of the plaintiff's own religious beliefs, and there are many such cases in which a plaintiff has been found to have standing.

The decision principally relied upon by the government—*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)—is entirely inapposite. It addressed a situation in which the plaintiffs lacked standing because they suffered no injury at all as a result of the challenged government action. Here, respondent did suffer injury—the adverse impact on his use and enjoyment of a federal park.

The government's argument on the merits—that the transfer of land to private ownership may cure any Establishment Clause violation—is not supported by this Court's precedents or lower court decisions. A fact-specific analysis is required to determine whether the transfer eliminates the factors that gave rise to the finding of an Establishment Clause violation. Here, the government's continuing involvement with the property and the likely continuing perception of government endorsement of religion make it impossible to conclude that the transfer vitiates the Establishment Clause violation.

ARGUMENT

I. RESPONDENT HAS STANDING TO CHALLENGE UNDER THE ESTABLISHMENT CLAUSE THE GOVERNMENT'S DISPLAY OF A LATIN CROSS.

Chief Judge Kozinski, writing for a unanimous panel below, concluded that respondent has standing to pursue the Establishment Clause claim in this case, squarely rejecting each of the arguments that the government renews before this Court. Pet. App. 104a-107a. Because the "inability to unreservedly use public land suffices as injury-in-fact" and respondent has shown that he is "unable to 'freely use[e]' the area of the [Mojave National] Preserve around the cross because of the government's allegedly unconstitutional actions"—the government's display of the cross (*id.* at 107a)—this Court should hold that respondent has established his standing to assert this claim.

A. An Individual Suffers An Injury Sufficient To Confer Standing When The Challenged Official Action Interferes with His Use Or Enjoyment Of Government Lands Or Facilities.

The government does not dispute the widely-recognized principle that an individual has standing to challenge under the Establishment Clause a government action that adversely affects the individual's use or enjoyment of a government park or other government facility. Nor could it, given the Establishment Clause cases resolved by this Court on the merits in which the plaintiffs' standing rested upon that precise type of injury.

In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), this Court recognized that the basis for the plaintiff's challenge to the display of the Ten Commandments on the grounds of the Texas State Capitol was that he had "encountered the Ten Commandments monument during his frequent visits to the Capitol grounds." *Id.* at 682. The district court explained:

> Plaintiff Van Orden testified that since 1995 he has made frequent use of the Texas State Law Library located in the State Supreme Court Building just northwest of the Capitol. * * * These visits bring the Plaintiff into frequent, and according to him unwelcome, contact with the Ten Commandments monument. * * * The Plaintiff testified that these contacts are offensive to him.

Van Orden v. *Perry*, 2002 U.S. Dist. LEXIS 26709, at *7 (W.D. Tex. Oct. 2, 2002), aff'd, 351 F.3d 173 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005).

The very same sort of injury was alleged in *McCreary County* v. *ACLU*, 545 U.S. 844 (2005), in which the district court had determined that the plaintiffs had standing "because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business" and that "direct contact" was "unwelcome" to the plaintiffs. *ACLU* v. *McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005); accord, *ACLU* v. *Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005).

This principle is broadly applied by the lower courts. See, *e.g.*, *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005); *Books* v. *Elkhart County*, 401 F.3d 857, 861-862 (7th Cir. 2005); *ACLU of Ohio Found, Inc.* v. *Ashbrook*, 375 F.3d 484, 489-490 (6th Cir. 2004); *Separation of Church and State Comm.* v. *City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (citing *Ellis* v. *City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993)); *Washegesic* v. *Bloomingdale Pub. Sch.*, 33 F.3d 679, 682-683 (6th Cir. 1994).

In the context of challenges to federal land use determinations or environmental regulations, it is settled that "harm to the forest or the environment" that "in fact affects the recreational or even the mere esthetic interests of the plaintiff * * * will suffice" to confer standing to challenge the government action allegedly producing the harm. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (citing *Sierra Club* v. *Morton*, 405 U. S. 727, 734–736 (1972)). So too, a plaintiff may challenge government action under the Establishment Clause that interferes with

his use and enjoyment of federal lands and other facilities.[2]

B. A Plaintiff May Assert An Establishment Clause Claim Even When His Religious Beliefs Are Not Offended By The Religious Symbol Or Practice Involved.

Unable to dispute the sufficiency for standing purposes of a plaintiff's diminished enjoyment and use of a federal park, the government instead focuses on the *reason* that the plaintiff is offended by the challenged government action and therefore is injured in his ability to use and enjoy the park. A plaintiff may assert an Establishment Clause claim, the Solicitor General says, only if the offensiveness to the plaintiff of the government action rests on the plaintiff's religious convictions: because the respondent here is a Roman Catholic and "does not 'find the cross, itself, offensive,'" he supposedly lacks standing to assert an Establishment Clause challenge. U.S. Br. 13 (citation omitted).

"The requisite elements" of the standing requirement "are familiar: 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by

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[2] The government raised in its certiorari petition (at 16-17) a supposed disagreement among the courts of appeals as to whether a plaintiff must alter his behavior in response to the existence of the religious display in order to establish an injury sufficient to confer standing. Any alleged conflict is irrelevant here, because respondent did in fact alter his conduct. See page 13, *infra*. Moreover, the cases requiring an alteration in conduct on which respondent relies all involve an Establishment Clause challenge to a local government seal or other symbol, not a challenge to the presence of a government religious display located on government property frequented by the plaintiff.

the requested relief.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 333 (2006) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). The Solicitor General's newly-minted requirement is entirely disconnected from this standard.

To be sure, the Establishment Clause does limit the extent to which government may "prefer one religion over another." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947). A claim in which the plaintiff's injury stems from government action alleged to discriminate against the plaintiff's religious beliefs therefore plainly is sufficient to confer standing.

But the Clause's preclusion of government endorsement of a particular religion also has as its purpose the protection of religion from government involvement as well as the prevention of government endorsement of religion. *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962) (the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

The Solicitor General is therefore wrong in her apparent belief that a Catholic could not claim an injury cognizable under the Establishment Clause from a government preference of Catholicism over other religions. A religious person may conclude either as a matter of religious doctrine[3] or on other

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[3] Some religions have as one of their beliefs the principle that government should not be involved with any aspect of the religion. Thus, the Governing Board of the National Council of Churches of Christ in the U.S.A. explained to the Court in its *amicus* brief in *County of Allegheny* v. *Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), that "'government acceptance of a creche on public property . . . secularizes and degrades a sacred symbol of Christianity.'" *Id.* at 651 n.8 (Stevens, J., dissenting)

grounds—that government endorsement of her particular religion, and the resulting expropriation of her religion's symbols for government purposes, is just as offensive, or even more offensive, than government endorsement of another religion. And if that offensiveness interferes with an individual's use and enjoyment of federal property, the individual has standing to sue.

This Court's cases recognize as much. For example, as respondent explains (Resp. Br. 24-25), the plaintiff in *Lee* v. *Weisman*, 505 U.S. 577 (1992), who objected to a rabbi's delivery of a prayer at the high school graduation ceremony was himself Jewish. Under the Solicitor General's approach, he would have lacked standing to challenge the prayer.

Finally, the Establishment Clause also limits the extent to which government may prefer religion over non-religion. *Wallace* v. *Jaffree*, 472 U.S. 38, 52-53 (1985); *Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (violates the Constitution to "pass laws or impose requirements which aid all religions as against non-believers"). A plaintiff whose claim of injury rests on the alleged government endorsement of any particular religion also would therefore have standing to sue.

The Solicitor General's restrictive standard for Establishment Clause standing is flawed for another reason. "Repeatedly and in many different contexts, [this Court has] warned that courts must not pre-

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(citation omitted); see also A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty* 3 (1990) ("[f]rom [Roger] Williams, John Clarke, and William Penn, the Founders learned that state control of religion corrupted faith").

sume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990). By tying a plaintiff's standing exclusively to the plaintiff's religious beliefs, the government's test would embroil courts in difficult and intrusive determinations regarding an individual's religious beliefs. Each court hearing an Establishment Clause claim would be obliged to decide if the plaintiff's objection in fact stemmed from her religious beliefs, an inquiry that would necessarily begin with a judicial determination of the precise nature of those beliefs.

The government does not—and cannot—point to a single case in which this Court has held that a plaintiff's standing to assert a claim under the Establishment Clause turned upon whether the plaintiff's objection to the government action was grounded in the plaintiff's own religious beliefs. Indeed, one of the two cases on which the government principally relies—*School District* v. *Schempp*, 374 U.S. 203 (1963)—specifically rejects that approach. Discussing the plaintiffs' standing to challenge the mandatory elementary school prayer, the Court stated simply that "[t]he parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." 374 U.S. at 224 n.9 (citation omitted).

The Solicitor General tries to create the impression that *Schempp* required a religion-based objection by pairing the "directly affected" phrase just quoted with a snippet from the Court's description of the facts of one of the two cases before the Court in *Schempp* (some 16 pages earlier in the opinion) indi-

cating that the mandated prayers were contrary to the plaintiffs' religious beliefs. See U.S. Br. 14. But the plaintiffs in the other case before the Court—not mentioned by the Solicitor General—were "professed atheists" (*Schempp*, 374 U.S. at 211) offended by government endorsement of religion, and their standing too was upheld by this Court.

Far from supporting the Solicitor General's "religion-based objection" requirement, therefore, *Schempp* confirms that all that is required for standing is an injury stemming from an objection resting on *any* of the interests protected by the Establishment Clause.

The other case relied upon by the government—*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)—is entirely inapposite. It addressed a situation in which the plaintiffs lacked standing because they suffered no injury at all as a result of the challenged government action. As Judge Kozinski pointed out for the panel below, *Valley Forge* "reminds the federal courts that only concrete, personalized injury—not an abstract, generalized grievance—suffices to confer standing." Pet. App. 105a-106a.

The plaintiffs in *Valley Forge* sought standing primarily on the basis of their status as taxpayers. After concluding that the plaintiffs were "plainly without standing to sue as taxpayers," the Court considered the court of appeals' conclusion that "the mere allegation of a legal right" conferred by the Establishment Clause was "sufficient to confer standing." 454 U.S. at 482-483.

Relying on its prior decisions in *United States* v. *Richardson*, 418 U.S. 166 (1974), and *Schlesinger* v.

Reservists Committee To Stop the War, 418 U.S. 208 (1974), the Court observed:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. * * * It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 454 U.S. at 485-486.

The Court went on—in the very next paragraph—to emphasize that it was not "retreat[ing] from [its] earlier holdings that standing may be predicated on noneconomic injury," but that the respondents had not "alleged an injury of any kind, economic or otherwise, sufficient to confer standing." *Id.* at 486. It pointed out that the named plaintiffs resided in Maryland and Virginia while the government property that was the subject of the claim was located in Pennsylvania. And, although the organizational plaintiff claimed members in Pennsylvania, "[i]t does not explain, however, how this fact establishes a cognizable injury," such as by alleging facts establishing that "one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution." *Id.* at 487 n. 23.

The Solicitor General attempts to justify its "religion-based objection" requirement by invoking a single phrase wrested from *Valley Forge*—that the plaintiffs there "failed to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." The Solicitor General claims that this phrase establishes that "ideological" objections cannot support standing; only "religious" objections are sufficient (even though the *Valley Forge* Court did not draw this distinction and even though both "ideological" and "religious" objections could be characterized as "psychological consequences").

As just explained, however, the *Valley Forge* Court used the phrase quoted by the Solicitor General to refer to situations in which the plaintiff had not suffered *any* particularized injury, economic or non-economic. The claim of harm instead rested solely on the plaintiffs' metaphorical "observation" of the implementation of a government decision with which they disagreed. The mere allegation of a constitutional violation, the Court determined, was not sufficient to confer standing.

This Court specifically *distinguished* situations in which the alleged constitutional violation affected a plaintiff's use and enjoyment of public land, pointing out explicitly that such facts had *not* been alleged by the plaintiffs in *Valley Forge*. Thus, "[t]he *Valley Forge* Court drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs." Pet. App. 106a (court of appeals opinion). The ruling accordingly provides no support

for the government's exclusion of non-religion based objections.

Here, respondent asserted an Establishment Clause challenge to a religious display of the sort that has been heard routinely by the lower courts and by this Court. The district court concluded that respondent "will tend to avoid Sunrise Rock [the cross's location] on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." Pet. App. 123a; see also J.A. 64-65, 82, 85 (respondent's testimony that he is offended because cross is located on federal land); J.A. 74-76 (respondent's testimony explaining interference with his use and enjoyment of the park). The court of appeals determined that respondent "is, in other words, unable to 'freely us[e]' the area of the Preserve around the cross because of the government's allegedly unconstitutional actions. We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact." Pet. App. 107a (citation omitted).[4] Respondent plainly has standing to pursue his claim.[5]

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[4] The government's assertion (U.S. Br. 16) that respondent's lacks standing based on "the costs he incurs" to avoid viewing the cross rests entirely on its erroneous view of *Valley Forge*. Because, contrary to the government's contention, the diminution in respondent's use and enjoyment of the park is an injury sufficient to confer standing, these additional burdens serve to confirm that cognizable injury, and not a device to confer standing by "incurring some tangible burden to avoid noncognizable injuries (*ibid.*).

[5] The government's arguments about third-party standing (U.S. Br. 17-20) are inapposite because respondent is asserting his own rights under the Establishment Clause to eliminate harm

II. TRANSFER OF A GOVERNMENT-OWNED RELIGIOUS SYMBOL TO PRIVATE OWNERSHIP DOES NOT AUTOMATICALLY ELIMINATE AN ESTABLISHMENT CLAUSE VIOLATION.

The government appears to argue (U.S. Br. 20-21) that it can cure any Establishment Clause violation involving government display of a religious symbol by simply transferring to private owners the piece of land that contains the religious symbol at issue. No lower court has adopted such a blanket rule and this Court's precedents provide no support for that approach. Under the appropriate fact-specific analysis, the transfer here does not remedy the constitutional violation.

First, the government makes much of the question whether a land transfer should be presumed to remedy any Establishment Clause violation. Certainly any congressional enactment is subject to a presumption of constitutionality, but that is very different from a presumption that the statute fully remedies a constitutional violation. Moreover, where—as here—the government is subject to an injunction based on a fully litigated constitutional claim and the record indicates substantial effort by

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that he has suffered directly (his loss of the use and enjoyment of the park because of the offense to him from the presence of the cross) resulting from the government's violation of the Establishment Clause.

Finally, the government's passing reference (U.S. Br. 13-14) to respondent's standing to challenge the land transfer is mystifying. Surely if respondent had standing to assert the Establishment Clause claim that led to entry of the injunction, he has standing to assert that the transfer does not sufficiently remedy the underlying constitutional violation.

the government to avoid the effect of the injunction (including prohibiting the use of federal funds to comply with the injunction (see Pet. App. 60a)), presuming that the transfer fully vitiates the Establishment Clause violation seems unjustified. Certainly a court would never entertain such a presumption if a private party subject to an injunction sought to avoid its effect by transferring the property at issue, after other efforts to avoid compliance had fallen short.[6]

That is not to say that a land transfer may never vitiate an Establishment Clause violation. Just that the determination depends upon the particular facts and circumstances of each case.

Second, the logical starting point in assessing the effect of the land transfer is to identify the factors that gave rise to the finding of an Establishment Clause violation. The court of appeals concluded that "the Sunrise Rock cross will project a message of government endorsement to a reasonable observer" (Pet. App. 111a). The court relied principally on the fact that the cross "sits on public park land." *Ibid.*

Third, the threshold question therefore is whether the transfer sufficiently disengages the government from ownership of the land on which the cross is located. Respondent demonstrates (Resp. Br. 37-48) that the continued status of the cross as a na-

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[6] In *Freedom From Religion Foundation, Inc.* v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000)—the decision on which the government rests its argument for a presumption—there was no finding of an Establishment Clause violation and no injunction entered prior to the sale of the land. That certainly distinguishes the case from one in which the constitutional violation has been adjudicated fully.

tional memorial and the government's continuing involvement with the site (see Pet. App. 26a-27a) support the district court's conclusion, upheld by the court of appeals, that "the government retains important property rights in, and 'will continue to exercise substantial control over,' the property on which Sunrise Rock is located, even after the land exchange." *Id.* at 29a (citation omitted). Compare *City of Marshfield*, 203 F.3d at 492 (after transfer, the City "ceased maintaining" the property; "no indication that the City is using the Fund merely as a straw purchaser, with the intention of continuing to exercise the duties of ownership").[7]

Fourth, even if the government has divested itself of the technical incidents of ownership, a court must consider whether "a violation of the Establishment Clause persists because the layout of the [cross] and the location and orientation of the statue would cause a reasonable observer to perceive that the [cross] was still a part of the * * * park and thus continues to constitute government endorsement of religion." *Id.* at 493. The Seventh Circuit concluded in *Marshfield* that despite the sale of the land to a private entity, the property remained "a part of th[e] public forum"—the surrounding public park—because of its historical association with the park, the buyer's commitment to use the property only for a public use, and the size and location of the property in comparison to the surrounding park. *Id.* at 494. It therefore applied this Court's decision in *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S.

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[7] In addition, the timing and means of transfer in this case demonstrate unusual government involvement. Cf. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687 (1994).

753 (1995), to assess the endorsement issue. 203 F.3d at 495-497.

The court of appeals here correctly concluded that "carving out a tiny parcel of property in the midst of this vast preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement" of religion. Pet. App. 33a. Indeed, petitioners had argued earlier in the case that, because of private property within the Preserve, a less well-informed reasonable observer would believe that the cross could be on private land, and the presence of the cross accordingly did not constitute an impermissible government endorsement of religion. The court of appeals' explanation in rejecting that argument is relevant here as well: "[g]iven the ratio of publicly-owned to privately-owned land in the Preserve and the use to which the Sunrise Rock area is put, a less well-informed reasonable observer would still believe—or at least suspect—that the cross rests on public land." *Id.* at 112a. That is another reason why the land transfer here does not vitiate the Establishment Clause violation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2009

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JUN 3 - 2009
OFFICE OF THE CLERK

No. 08-472

IN THE
SUPREME COURT OF THE UNITED STATES

KEN L. SALAZAR, Secretary of the Interior, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS* IN THIS CASE[1]

The American Legion Department of California represents some 130,000 Legionnaires organized in Posts, Districts, and Areas throughout the State of California. The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans organization. Since its inception, The Legion has maintained an ongoing concern and commitment to veterans and their families, and is a tireless advocate for veterans' rights. It is dedicated to preserving American values, promoting patriotism, and encouraging selfless service and sacrifice among the Nation's youth. And it seeks to honor the sacrifice for our country of those men and women of our armed forces who have gone before us, support those who continue to sacrifice for our country today, and prepare those who will be called to sacrifice for all of us in the future.

To this end, the Department of California has established the Defense of Veterans Memorials Project, through a working relationship with the Alliance Defense Fund. The express mission of this project is to defend veterans memorials throughout California, including the memorial that is the subject of this lawsuit.

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[1] All counsel of record have consented to the filing of this brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The relaxed standing rule for Establishment Clause claims authorized by the Ninth Circuit's decision below poses a grave threat to veterans organizations, like *amicus*. These groups commonly use crosses in veterans memorials because the cross is a uniquely transcendent symbol representing the decision to lay down one's life for the good of others. Under the Ninth Circuit's decision, a plaintiff with any ideological objection to a memorial cross on public property can challenge the memorial's constitutionality in court – even when the objection is based entirely on perceived harm to others.

The unpredictability of Establishment Clause cases in general makes it impossible for government officials and veterans organizations to know when a particular memorial is unconstitutional. Allowing proliferation of cases challenging these memorials through permissive standing only compounds the problem. To stem this confusion, this Court should clarify that Article III requires plaintiffs to have a concrete injury to bring an Establishment Clause case, and order this case be dismissed for lack of standing.

ARGUMENT

I. The Ninth Circuit's "offended observer" standing decision is inconsistent with Article III and the decisions of this Court.

This *amicus* agrees with the United States that the plaintiff lacks standing to bring his Establishment Clause claim. The Ninth Circuit's holding to the contrary is symptomatic of a burgeoning infirmity among the circuit courts: diluting Article III standing requirements so that plaintiffs may bring lawsuits alleging nothing more than their offense to a passive public display with a religious element. These delicate plaintiffs with eggshell sensitivities – who claim deep offense at the perceived acknowledgement of any beliefs that conflict with their own – then seek court orders censoring the religious display, as a type of heckler's veto. *See Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 684 (6th Cir. 1994) (Guy, J., concurring) (arguing that the "psychological damage" from viewing a religious portrait does not create a legal injury, and holding otherwise creates "a class of 'eggshell' plaintiffs of a delicacy never before known to the law").

This case is particularly troublesome because the Ninth Circuit lowered the bar even further for an "offended observer" to establish Article III standing. The plaintiff in this case does not claim, as in most memorial cross cases, that he has standing because he is offended by the presence of the cross itself. Rather, he claims – and the Ninth Circuit accepts –

that he has standing because he is ideologically opposed to the government displaying a cross without opening a forum for others to erect their own monuments. *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004). The plaintiff does not wish to erect his own monument; he is simply offended that others are not free to do so. Thus, the plaintiff's standing rests entirely on his perception of harm to *others*.

Contrary to the Ninth Circuit's new rule, this Court has been clear that standing requires some concrete actual or threatened personal injury. Article III standing cannot come from perceived harm to mere psyche, feelings, or ideology. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982). Nor can it come from merely asserting the rights of others. This Court has long held that "the general rule is that a litigant may only assert his own constitutional rights or immunities." *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) (finding the plaintiff lacked standing for this reason) (internal quotation marks and citation omitted).

The Court has not wavered from *Valley Forge*'s "irreducible minimum" in the two decades since it decided that case. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 771 (2000) (standing requirements are "an essential and unchanging part of Article III's case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches") (internal quotation marks and citations omitted). This requirement is generally strict: even in environmental lawsuits, where the

harm is naturally more dispersed, plaintiffs still must demonstrate a direct and particularized injury to their unique interest. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (stating that plaintiffs allege injury in fact when they demonstrate that they uniquely are persons for whom the aesthetic and recreational values of the affected area will be lessened by the challenged activity, as opposed to citizens with a general interest in a clean environment`) *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (holding that "general averments" and "conclusory allegations" are inadequate when there is no showing that the particular acres out of thousands were affected by the challenged activity).

The plaintiff here tries to muster support for its position from *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), attempting to stretch a parallel between a law that required school children to begin their day with Bible reading and prayer, and occasionally driving past a passive memorial in a national preserve. But this Court has already rejected this type of far-fetched comparison: "The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. In other words, the threshold standing question cannot be conflated with the ultimate substantive question, as the Ninth Circuit did in this case. The *Schempp* plaintiffs had a concrete injury because the challenged law required

that suggestible, captive schoolchildren be led in daily religious exercises. *Schempp*, 374 U.S. at 205-208. An adult choosing to drive past a passive memorial containing a cross is not required, coerced, or even encouraged to view the display, much less agree with any particular religious tenet.

In short, without concrete injury, Article III cannot be satisfied – the Constitution refused to give every concerned bystander a free pass into court.[2] Certainly, all speech has potential to offend, but insult without injury is not enough to create a case or controversy.

II. The Ninth Circuit decision has added to the wildly divergent views among the circuit courts about how to properly evaluate Establishment Clause claims.

A. The circuit courts frequently disagree about what constitutes sufficient harm to confer Article III standing.

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[2] This Court has emphasized the fundamental importance of the standing requirements to the entire framework of our constitutional form of government. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers"); *Lujan*, 504 U.S. at 559-60 ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts"); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (standing inquiry "serves to identify those disputes which are appropriately resolved through the judicial process").

Despite this Court's clear teachings to the contrary, there remains a great deal of confusion among circuit courts, among litigants, and among individual panels of judges on what is sufficient harm to confer standing. It is becoming increasingly common for circuit court panels to split into significantly divergent opinions on standing. *See, e.g., Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (producing three completely contrasting views on whether plaintiffs had requisite concrete harm for standing in an environmental case); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (denying standing with an opinion concurring in the judgment, over a dissent); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) (rehearing produced a majority, a special concurrence, and two dissents on whether plaintiffs had offended observer standing for an Establishment Clause challenge); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 794-95 (9th Cir. 2008) (Kleinfeld, dissenting) (noting that the majority adopted the same offended observer standing argument that it flatly rejected earlier in the case).

At the same time, many federal judges have vehemently criticized the notion that a plaintiff can satisfy Article III's standing requirements merely by expressing offense at any government complicity in religion. *See, e.g., Washegesic*, 33 F.3d at 684-85 (Guy, J., concurring). Judge Easterbrook of the Seventh Circuit has addressed this issue at some length in two different opinions. *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (Easterbrook, J., dissenting); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (Easterbrook, J., dissenting). He

points out that *Valley Forge* requires courts to distinguish between injured and ideological plaintiffs, despite the line of circuit court decisions that have attempted to reduce *Valley Forge* to a "hollow shell." *Books*, 401 F.3d at 871.

Compounding this confusion is the fact that outside the Establishment Clause arena, "offended observers" have no standing to challenge the government's views on particular issues. Governmental messages to support the war in Iraq or to stop smoking or to reduce greenhouse emissions may be deeply offensive to certain people, but they do not give standing for those offended to go to court to censor the message. Indeed, while the Ninth Circuit's flawed opinion gave the plaintiff in this case his day in court, the fallen soldier's mother who is deeply offended by the plywood box that now hides the veterans' memorial from public view has no similar legal recourse. Lack of a judicial remedy does not silence these citizens, however. Their remedy is in the political process: "When the government expresses views in public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem." *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting).

Some argue that if courts do not relax standing requirements for plaintiffs to file such actions, then no one would have standing to challenge government actions that might violate the Establishment Clause. But this Court has already explained that the "assumption that if respondents

have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (citation omitted). Judge Easterbrook concurs, noting:

> If because no one is injured there is no controversy, then the Constitution demands that the court dismiss the suit. There is no exception for subjects that as a result cannot be raised at all. . . . If there is no case, then there is no occasion for deciding a constitutional question, and we should not mourn or struggle against this allocation of governmental powers.

Harris, 927 F.2d at 1422 (Easterbrook, dissenting) (citations omitted).

Consistently requiring plaintiffs to show concrete injury, even in Establishment Clause cases, will bring order to an area of law inundated with lawsuits brought by plaintiffs with attenuated standing to challenge the government's actions.

B. A relaxed standing requirement is particularly troublesome when combined with the uncertainty of this Court's Establishment Clause precedent.

Members of this Court have candidly acknowledged that "in respect to the First Amendment's Religion Clauses . . . there is 'no

simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in judgment) (quoting *Schempp*, 374 U.S. at 306) (Goldberg, J., concurring)). Indeed, Establishment Clause jurisprudence has proven to be one of the most unpredictable areas of American law. Since at least the decision in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), this Court has struggled to find a consistent Establishment Clause test. As the Court has recognized, "[t]here is no exact science in gauging the entanglement of church and state." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 766 (1976). This Court has also noted that Establishment Clause challenges involve fact-specific inquiries that will often lead to varying results. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 607-08 (1989); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment) (stating that "no exact formula can dictate a resolution to such fact-intensive cases").

It is impossible to know with any degree of certainty whether an aspect of a government display somehow violates the Establishment Clause when this Court and the courts of appeal are unable to reach a consensus. Although it appears that the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains the dominant Establishment Clause test, the Court has also "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (citation omitted). This

Court has, in fact, applied several different tests to Establishment Clause cases. *See id.* (endorsement test); *Lee v. Weisman*, 505 U.S. 577 (1992) (psychological coercion test); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (neutrality test); and *Marsh v. Chambers*, 463 U.S. 783 (1983) (historical test). And several Justices have explicitly questioned *Lemon*'s continued value. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (citing instances in which Justices Scalia, Thomas, Kennedy, O'Connor, and Chief Justice Rehnquist have criticized the *Lemon* test). Nonetheless, no test has yet conclusively supplanted *Lemon*.

Circuit courts have long lamented that this Court's Establishment Clause tests are difficult to apply and lead to inconsistent results. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proved ineffective."); *ACLU of N.J. v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (Nygaard, J., dissenting) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Barnes v. Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has

received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon*'s analytical framework."); *Harris*, 927 F.2d at 1419 (Easterbrook, J., dissenting) ("Applying *Lemon* . . . to religious symbols on city seals is no cakewalk. *Lemon*'s 'three-part test' is not a test. It is a triad of questions, the answers to which conflict in all interesting cases.").

The recent Ten Commandments decisions by the Court highlight the confusion that the government faces in trying to gauge whether a particular display that includes religious elements complies with the Establishment Clause. In *McCreary County*, a plurality found that a public display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause. 545 U.S. at 881. But *Van Orden*, also a plurality decision, held that a public display of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. 545 U.S. at 692. The plurality in *McCreary* applied the *Lemon* test, 545 U.S. at 864, but the plurality in *Van Orden* jettisoned *Lemon* in favor of an analysis "driven both by the nature of the monument and by our nation's history." 545 U.S. at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with the sort of passive monument that Texas has created on its Capitol grounds"). Thus, the plurality in each case applied a different test and came to a different outcome regarding the public display of the Ten Commandments. After the dust cleared, only Justice Breyer thought that both decisions came to the right

result. *McCreary*, 545 U.S. at 850 (joining in the plurality); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring).

Regardless of what one thinks the outcome of the Establishment Clause decisions should be, it is beyond dispute that they are highly unpredictable, even for constitutional scholars. The permissive standing rule adopted by the Ninth Circuit, combined with the unpredictable Establishment Clause jurisprudence of this Court, makes it impossible for anyone to know with any degree of certainty when it is constitutionally permissible to use crosses or other religious symbols in public displays.

III. The Ninth Circuit's relaxed standing requirement threatens countless existing memorials and severely chills the government's willingness to allow future memorials to be erected.

The uncertainty that clouds this Court's Establishment Clause and standing jurisprudence poses a grave threat to the military and to veterans organizations, like *amicus*, that commonly use crosses in memorial displays. This has a substantial chilling effect on these groups' ability to erect such memorials, and on the government's willingness to permit such memorials on public land.

This threat is particularly grave because the cross is a uniquely transcendent symbol representing the decision to lay down one's life for the good of others. Eliminating it from current or

future veterans memorials, like the Mojave Desert Veterans Memorial, will blunt the core message these memorials seek to communicate. As one historian explained, "the cross is an emblem more universal in use than any other in the world." George Willard Benson, *The Cross: Its History and Symbolism* 61 (1934). The Latin cross is commonly used on military memorials to honor veterans who have given their lives in service to this country. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1215-16 (S.D. Cal. 2008) (listing examples). And one of the most enduring and well-known images honoring our nation's veterans are the rows of white crosses that memorialize America's war dead in military cemeteries around the world. These international cemeteries house the remains of almost 125,000 fallen American servicemen and servicewomen. *See* American Battle Monuments Commission, Cemeteries, http://www.abmc.gov/cemeteries/index.php (last visited June 1, 2009). The military uses a cross headstone for soldiers from a multitude of religious traditions, and those with no religious affiliation at all. *See, e.g.*, American Battle Monuments Commission, *Normandy American Cemetery and Memorial*, at 18-19, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited June 1, 2009) ("Each grave is marked with a white marble headstone, a Star of David for those of the Jewish faith, a Latin cross for all others.").

The military and veterans organizations use the cross in other ways as well. It is used as a symbol to honor extreme gallantry and heroism in decorations such as the Distinguished Service Cross

(10 U.S.C. § 3742), the Navy Cross (10 U.S.C. § 6242), the Air Force Cross (10 U.S.C. § 8742), and the Distinguished Flying Cross (10 U.S.C. § 3749). And use of the cross as an "emblem for valor and bravery" is not unique to our military; rather, "[f]rom the time of the Crusades until the last great war, decorations for chivalry and for distinguished service have been made in the form of a cross." Benson, *supra*, at 57.

Crosses are also commonly used to symbolize death. The Montana American Legion, for example, has marked fatal traffic accidents throughout that state with white crosses for more than 55 years – over 2,000 markers have been erected to date. *See* Highway Fatality Marker Safety Program, http://www.mtlegion.org/programs/Marker.php (last visited June 1, 2009).

The tradition of using crosses to symbolize death and burial is rooted as much in culture as it is in religion. "[C]rosses are overwhelmingly employed in the design of memorials but apparently more as a matter of cultural integration, i.e., a reflex as opposed to an intentional or specific act of faith." Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 Omega: Journal of Death and Dying 221, 229 (2003); *see also* Jennifer Clark & Majella Franzman, *Authority from Grief, Presence and Place in the Making of Roadside Memorials*, 30 Death Studies 579, 591 (2006) (finding that crosses are "general markers of death and sacredness rather than purely Christian symbols"); Sylvia Grider, *Spontaneous Shrines in Public Memorialization, in Death and Religion in a Changing World*, 259

(Kathleen Garces-Foley ed., 2005) (noting that the practice of marking fatal car wrecks with roadside crosses is "deeply rooted in history" and an "integral feature of the cultural landscape throughout Central America, Mexico, and the Hispanic southwestern United States").

In short, the cross is one of the most common – and significant -- symbols of our society. And the Ninth Circuit's relaxed standing requirement makes every cross on public property the potential subject of time-consuming and expensive litigation – solely because of one eggshell plaintiff's general offense to the cross or what may (or may not) be displayed next to it. Even when government officials believe that an Establishment Clause challenge would be meritless, the hassle and expense of such lawsuits and the fear of being saddled with attorney fees create a strong incentive for removing existing displays, and refusing to allow similar displays in the future. The end result: "a hostility toward religion that has no place in our Establishment Clause traditions," and the "very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) (citation omitted).

CONCLUSION

For more than two hundred and twenty-five years, millions of Americans have sacrificed their lives for their country. Their memories will long endure, etched in granite and marble, chiseled with a permanence that echoes their valiant lives. Every man and woman who fought our Nation's wars and

died in service is remembered in local, state, and national war memorials. It is disheartening to think that these memorials may be gutted because there are those who ignore the unique way the cross has universally honored the choice our soldiers made to lay down their lives for the good of the rest of us. If we cannot publicly acknowledge this Nation's religious history and heritage to honor those who have made the ultimate sacrifice, how can we as a Nation ever look into the face of youth to call on it to once again return to the altar of freedom and offer the same sacrifice given by generations before?

No memorial, however brilliantly conceived, can represent the sentiments of all those it is meant to serve. But conflicting sentiment, as in this case, does not create a constitutional injury. As such, *amicus* respectfully requests that this Court reverse the decision of the Ninth Circuit and order the case be dismissed because the plaintiff lacks standing.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE CLERK

No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, MILITARY RELIGIOUS FREEDOM FOUNDATION, NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND UNION FOR REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The *amici* joining in this brief represent diverse religious and secular beliefs, but share a common interest in preserving religious liberty and preventing religious discrimination.[1]

Amici have a substantial interest in ensuring that public lands and facilities are equally open to all citizens regardless of their faith, and that the Establishment Clause's strict prohibitions against official religious favoritism remain intact.

Because several *amici* have joined in this brief, more detailed descriptions of each appear in Appendix A. The *amici* are:

- Americans United for Separation of Church and State, a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state.
- The Anti-Defamation League, organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.
- The Jewish Council for Public Affairs, the coordinating body of 14 national and 127 local Jewish community-relations organizations.

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[1] No counsel for either party authored this brief in whole or in part, and no persons or entities other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Consent letters from the parties are on file with the Clerk.

- The Military Religious Freedom Foundation, an organization dedicated to ensuring the religious freedom of all members of the United States Armed Forces.
- The North American South Asian Bar Association, an umbrella organization of 27 regional bar associations in North America that serves as the principal voice for attorneys of South Asian descent.
- People For the American Way Foundation, a nonpartisan citizens' organization established to promote and protect civil and constitutional rights.
- The Union for Reform Judaism, the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews.

INTRODUCTION AND SUMMARY OF ARGUMENT

Government-sponsored religious symbols are potent forms of speech that can have real, palpable effects on people who are subjected to them. The harm from them is not that they evoke mere distaste, displeasure, or even disgust. It is that they deprive citizens of the use and enjoyment of public lands, because using a public facility where the government has chosen to erect a monument to one faith stigmatizes nonadherents as second-class citizens, while demeaning the faith of adherents by coopting what is sacred.

Dismissing those harms as trivial, some of Petitioners' *amici* invite this Court to curtail or limit standing to challenge religious displays. See, *e.g.*, ACLJ's *Amicus* Br. 4-23; Cal. Am. Legion's *Amicus* Br. 3-9. This Court should decline that invitation, not only because accepting it would upend well-settled Establishment Clause jurisprudence and abrogate scores of decisions by this Court and the lower federal courts, but also because the harms inflicted by governmental displays are too significant to go unremedied.

Whether a land transfer can cure an Establishment Clause violation turns on the facts and circumstances of the case. At a minimum, however, the government must truly divest itself of ownership and control over the land, and clearly inform the public that it is no longer associated with the display. Here, the government has declined to take any steps that would disassociate it from the religious message conveyed by the cross. The land transfer to the VFW involves no fences, signs, disclaimers, or other visual cues to inform visitors to the Preserve that the land and cross are privately owned, or that the government has repudiated its longstanding display of the cross. The land transfer thus does not truly undo the government's unconstitutional act.

ARGUMENT

I. Standing To Challenge Government-Sponsored Religious Displays Accords With Settled Standing Rules.[2]

Petitioners' *amici* are quick to dismiss, as mere generalized grievances, having one's sacred symbols demeaned through official appropriation, being stigmatized by the government's aligning itself with a faith to which one does not subscribe, and being deprived of the enjoyment of public lands and facilities when those other harms are the price of entry. But a jurisdictional bar to claims concerning religious displays cannot be squared with the careful distinction that this Court has drawn between mere abstract knowledge of unlawful governmental action — which is not a basis for standing, under the Establishment Clause or elsewhere — and the deprivation of the use and enjoyment of public lands — which is.

A. Official use of religious symbols can inflict substantial injuries.

Symbols have power. They encapsulate many layers of meaning, and communicate complex ideas far more effectively, and far more forcefully, than mere words can. As Justice Jackson explained, "[t]he use of an emblem or flag to symbolize some system, idea,

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[2] *Amici* agree with Respondent that his standing is not properly before this Court. See Resp. Br. 11-18. But because Petitioners challenge Respondent's standing, and some of their *amici* would rewrite the standing rules wholesale, this Court may benefit from more thorough analysis of what is at stake.

institution, or personality, is a short cut from mind to mind." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943); see also *Regan* v. *Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting "adage that 'one picture is worth a thousand words,'" and citing "image of money" as "an especially evocative and powerful way of communicating ideas about matters of public concern, ranging from economics to politics to sports"). Symbols, no less than words, affect viewers' perceptions; their emotions; their actions.

The power of symbols not just to communicate, but to persuade, and to incite action, explains their ubiquity, both historically and today. As a practical matter, they "are an immensely cheap form of propaganda: they attract public notice, they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart * * *." NICHOLAS JACKSON O'SHAUGHNESSY, POLITICS AND PROPAGANDA 102 (2004); see also *Barnette*, 319 U.S. at 632 ("Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.").

As this Court has recognized, the U.S. flag has just that power. Images of the Stars and Stripes rising from atop Mount Suribachi on Iwo Jima in 1945, and from the rubble of the World Trade Center in 2001, capture American resilience more eloquently than words ever could. And nothing conveys a sense of valor and sacrifice more than a flag-draped coffin. "Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in

'America.'" *Texas* v. *Johnson*, 491 U.S. 397, 405 (1989); see also, *e.g.*, *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907) (recognizing that no citizen can view U.S. flag "without taking pride in the fact that he lives under this free government").

Precisely because of its unique symbolic value, the flag lends special power to individual expressions of dissent. See, *e.g.*, *Johnson*, 491 U.S. at 406 (flag-burning at opening of national political convention was "mo[st] powerful statement of symbolic speech * * * [that] could[] have been made at that time"); *Spence* v. *Washington*, 418 U.S. 405, 410 (1974) (peace sign affixed with black tape to inverted U.S. flag was "a pointed expression of anguish * * * about the then-current domestic and foreign affairs of [the] government"). And since this Court struck down legislation criminalizing some expressive uses of the flag (see *United States* v. *Eichman*, 496 U.S. 310 (1990)), resolutions proposing constitutional flag-desecration amendments have become a perennial feature of Congressional sessions as well as popular discourse (see Muriel Morisey, *Flag Desecration, Religion & Patriotism*, 9 RUTGERS J. L. & RELIGION 1, 4-5, 11 (2007) (chronicling historical and contemporary efforts to criminalize flag desecration)). Indeed, the very idea of "flag desecration" reflects the sanctity of the symbol as the embodiment of our national identity and fundamental values.

The importance of the U.S. flag as the embodiment of those values is evident even in the flag's absence: Then-candidate Barack Obama's failure to wear a flag pin on his lapel while on the campaign trail generated

frenzied speculation about whether he was unpatriotic, and therefore unfit for office. See, *e.g.*, Alec MacGillis, *Obama Faces Test in Asserting His Own Brand of Patriotism*, WASH. POST, May 4, 2008, at A1; Jim Rutenberg & Jeff Zeleny, *The Politics of the Lapel, When It Comes to Obama*, N.Y. TIMES, May 15, 2008, at A27; Jeff Zeleny, *The Politician and the Absent American Flag Pin*, N.Y. TIMES, Oct. 5, 2007, at A22.

In more prosaic aspects of life, symbols play equally critical roles. In commerce, for example, they permit 'branding' — *i.e.*, conditioning consumers to respond favorably to, and thus to purchase, a company's products. See JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 63, 67 (2004); O'SHAUGHNESSY, POLITICS AND PROPAGANDA, *supra*, at 102. Social scientists have identified a repeated-exposure effect that "induces more familiarity and, as a consequence, greater liking," for a product, "independent of any conscious cognitive appraisal" of the product's quality or value. O'SHAUGHNESSY & O'SHAUGHNESSY, PERSUASION IN ADVERTISING, *supra*, at 63, 67. "Making a brand familiar by repeated exposure through advertising encourages its adoption." *Id.* at 63. Thus, for example, aggressive advertising of pharmaceuticals leads to patients' "insist[ing] on [brand-name drugs] * * * even though less expensive and equally effective alternatives are available." *Ibid.* In other words, the use of a simple, evocative symbol fosters special affinities for what is being symbolized, in ways that rational argument or other forms of persuasion often cannot.

What is true for symbols generally is doubly so for religious ones. Empirical research confirms that such symbols can measurably affect behavior, even when displayed with no intent to proselytize or persuade.

Studies have shown, for instance, that viewing a religious symbol has statistically significant effects on students' academic performance. Researchers established baseline standardized-test scores for students attending Catholic elementary and junior-high schools in the United States, then retested the students, randomly dividing them into three groups. The examiner wore a necklace with a cross while retesting one group, a necklace with a Star of David while retesting the second, and no religious signifier while retesting the third. The researchers found that the students did systematically better when the examiner wore the cross, and systematically worse when he wore the Star of David. See Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417-18 (1986); Philip A. Saigh et al., *Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students*, 145 J. GENETIC PSYCHOL. 159, 159-62 (1984). The researchers conducted a similar study in religiously diverse Lebanon, and obtained similar results. Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168-69 (1979) (both Christian and Muslim students did better when examiner wore their faith's symbol, and worse when examiner wore other faith's symbol). The researchers attributed the effect to students' anxiety

over "confessional conflict" with an authority figure, on the one hand, and comfort in the presence of a coreligionist, on the other. See Saigh, *Junior High*, *supra* at 418; Saigh, *Parochial School Students*, *supra*, at 16[illegible], Saigh, *Lebanese Elementary Schoolchildren*, *supra*, at 170-71. But regardless of the specific psychological mechanism at work, the studies revealed that even slight but direct exposure to religious symbols displayed by authority figures affected students' academic performance.

What is true for children is equally true for adults. In an unrelated study, adult test subjects were exposed to a subliminal image on a computer screen. Some were shown a picture of Jesus; and some, a Satanic symbol. See Max Weisbuch-Remington et al., *The Nonconscious Influence of Religious Symbols in Motivated Performance Situations*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1203, 1207-08 (2005). The test subjects were then asked to prepare and deliver a speech under conditions designed to induce stress. *Id.* at 1208. Relative to baseline measurements, Christian subjects who had viewed the image of Jesus exhibited higher blood-oxygen saturation and less blood vessel constriction (reflecting lower stress levels), while those who had viewed the Satanic symbol exhibited the opposite responses. See *id.* at 1208-10. In other words, even subliminal exposure to a symbol of one's own faith can yield physical as well as psychological benefits, while similar exposure to what one might consider a 'negative' religious symbol can be correspondingly detrimental.

The cross is, of course, the "supreme emblem of Christianity," and one of humanity's most ancient, widely recognized, and deeply hallowed symbols. See, *e.g.*, George Willard Benson, *The Cross: Its History and Symbolism* 11-16, 61 (Kessinger Pub. 2003). Both historically and today, the cross unites peoples. It divides nations. It provides shelter to the needy and sanctuary to the oppressed. It rallies soldiers to arms. It acts as a shield. It can be wielded as a sword.[3] To dismiss an official display of a large cross as merely passive and therefore insignificant, as petitioners' *amici* do,[4] is to misunderstand not only the display's purpose, but also the cross's essential nature and abiding power, both for those who cherish it and for those who do not. Cf. *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (recognizing coercive effect of "the permanent erection of a large Latin cross on the roof of city hall") (Kennedy, J., concurring in part and dissenting in part).

Indeed, the unique potency of the cross for transmitting complex messages and inciting action is

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[3] Nor are these uses mere historical relics. To take just one recent example, armies in the Balkans during the 1990's used the cross, as well as other traditional religious symbols, to forge a sense of national identity and unity among soldiers, displaying the symbols on uniforms, military equipment, and weapons. See Mitja Velikonja, In Hoc Signo Vinces: *Religious Symbolism in the Balkan Wars 1991-1995*, 17 INT'L J. POLITICS, CULTURE, & SOC'Y 25, 29-30 (2003).

[4] *E.g.*, ACLJ's *Amicus* Br. 4, 13, 15, 17; Cal. Am. Legion's *Amicus* Br. 3; Liberty Counsel's *Amicus* Br. 14-15, 18-19, 22, 24, 31, 35; VFW's *Amicus* Br. 26-27.

precisely why religious institutions and individuals employ that symbol. Cf., *e.g.*, Cal. Am. Legion's *Amicus* Br. 13-14 (arguing that cross is "uniquely transcendent symbol representing the decision to lay down one's life for the good of others"); *American Atheists, Inc.* v. *Duncan*, 528 F. Supp. 2d 1245, 1249 (D. Utah 2007) (defendants selected crosses to memorialize dead state troopers and refused to allow alternative memorials for non-Christians because they believed that "only a cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety").

It is also what encourages the cross's misuse. As this Court has recognized, the Ku Klux Klan has appropriated the cross as a powerful and highly effective weapon to foster hatred and intolerance, and to incite violence. See *Virginia* v. *Black*, 538 U.S. 343, 357 (2003) (noting that burning cross is a symbol of ideology and unity to Klan members, and "a message of intimidation, designed to inspire in the victim a fear of bodily harm," to nonmembers); *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring) (explaining that KKK "has appropriated one of the most sacred of religious symbols as a symbol of hate" and "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, communists, and any other groups hated by the Klan").

Nor is the Klan alone in appropriating the power of the cross for evil. The Nazi Party adapted it to form the swastika, thereby exploiting it to advance the Nazi political and social agendas, and all the horrors that

went with them. See, *e.g.*, Simon Taylor, *Symbol and Ritual Under National Socialism*, 32 BRITISH J. SOCIOLOGY 504, 506-07 (1981); see also O'SHAUGHNESSY, POLITICS AND PROPAGANDA, *supra*, at 55 (noting that Nazis "used pseudo-classical symbols" to condition citizens' behavior). Indeed, the Nazis launched their propaganda campaign by recasting the failed putsch of 1923 as a ritual sacrifice. Taylor, *supra*, at 506-07. Display of the "Bloodflag" — the familiar black swastika in a white circle on a red field — was the centerpiece of that effort, evoking the blood of the sixteen putsch 'martyrs' whose deaths were necessary to usher in the Third Reich. *Id.* at 507-09. The flag, "a transparent allegory of the Christian cross," thus became "the holiest relic of the National Socialist movement," and the key to a national mythology that cast Hitler as "Christ of the Second Coming," Jews as a conspiracy of "evil ones" that had to be purged to make way for him, and the German people as "the chosen ones" who would endure beyond the apocalypse. *Id.* at 509-10, 514-15. The twisted cross thus promulgated Nazi ideology and united the German people behind it. *Id.* at 504-05.

The public display of a symbol like the cross — whether for good or for evil — thus cannot be dismissed as trivial. It bombards the observer with its message visually rather than aurally; but as both research data and historical evidence demonstrate, that feature only makes its message all the more powerful.

B. Denying standing in religious-display cases would upend decades of settled jurisprudence.

Words alone can, of course, cause injuries, whether they take the form of insults,[5] defamation,[6] or official sponsorship of religion; and this Court has never doubted plaintiffs' ability to seek redress for those injuries. See, *e.g.*, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 855-56 (2005) (framed copy of Ten Commandments); *Allegheny*, 492 U.S. at 598 (crèche beneath sign reading "Glory to God in the Highest!"); *Marsh* v. *Chambers*, 463 U.S. 783, 784, 793 n.14 (1983) (nonsectarian legislative prayer). When the sovereign communicates a religious message, those who receive it are not mere "concerned bystanders" grousing about "conduct with which [they] disagree[]." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 485 (1982). They are victims of governmental pressure to accept and participate in an officially favored creed.

Thus, this Court held nearly half a century ago that students and parents "surely" had standing to challenge Bible-reading in public-school classrooms because they were "directly affected" by the practice. *School Dist.* v. *Schempp*, 374 U.S. 203, 205, 224 n.9 (1963). As this Court later explained, that direct effect was that the students were either "subjected to"

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[5] RESTATEMENT (SECOND) OF TORTS § 48 (1965) (common carriers liable for employees' gross insults to patrons).

[6] RESTATEMENT (SECOND) OF TORTS §§ 559, 568 (1977) (injuries to reputation actionable).

unwanted religious messages or "forced to assume special burdens to avoid" them. *Valley Forge*, 454 U.S. at 486 n.22 (explaining standing in *Schempp*).[7]

If being subjected to government-sponsored religion through the spoken or written word constitutes a cognizable injury, so too should being subjected to that same message in symbolic form. And if viewers have standing to challenge the written word despite the ability to avert their eyes (see generally *McCreary, supra*), and listeners have standing to challenge the spoken word despite the ability to plug their ears (see *Marsh*, 463 U.S. at 786 n.4), then it should be no answer to those who are subjected to religious symbols in a courtroom, park, or school to say, "cover your eyes or don't use the public facility."

The lower federal courts have thus consistently held that plaintiffs have standing to bring Establishment Clause actions where they are personally and directly affected by a government-sponsored religious display. And this Court has not hesitated to reach the merits in those cases. Indeed, *Amici* have identified, and listed in Appendix B to this Brief, an expansive body of Establishment Clause case law encompassing scores of decisions — including four from this Court — where

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[7] Petitioner's *amici* contend that *Valley Forge* stands for the sweeping proposition that no psychological injury, whatever its nature or source, can cross Article III's threshold. (See ACLJ's *Amicus* Br. 6-8; Cal. Am. Legion's *Amicus* Br. 3-4.) But the problem in *Valley Forge* was not that psychological harm is insubstantial. It was that the plaintiffs could not claim to have been directly touched by the challenged governmental action because they had merely read about it in the newspaper. See 454 U.S. at 486-87.

standing was premised, in whole or in part, on the plaintiffs' having been personally subjected to a religious display.[8] Although the plaintiffs were not always successful on the merits, what these cases show is that at least some harms from displays are clear, substantial, and deserving of redress; and that those harms would often be entirely irremediable if the accepted rules and forms of standing were jettisoned.

1. Religious displays in the public schools have, for example, the potential to inflict especially egregious and otherwise irremediable harms on impressionable children. In *Stone* v. *Graham*, 449 U.S. 39 (1980), for example, this Court invalidated a Kentucky statute requiring the posting of the Ten Commandments in every public-school classroom, because the statute's only conceivable effect was "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42. Similarly, in *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), the Sixth Circuit held that a public school in Michigan violated the Establishment Clause by displaying a portrait of Jesus alone in a prominent place outside the principal's office for 30 years (*id.* at 681), where the portrait's effect was "to make children look at, meditate upon, and perhaps revere Jesus Christ" (*Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559, 563 (W.D. Mich. 1993), aff'd, 33 F.3d 679 (6th Cir. 1994)).

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[8] *Amici* have excluded cases where taxpayer status appears to have been the sole asserted basis for standing — such as in *Donnelly* v. *Lynch*, 691 F.2d 1029, 1030-32 (1st Cir. 1982) (unreviewed determination of taxpayer standing), rev'd on merits, 465 U.S. 668 (1984).

In both instances, the displays were 'passive,' but their placement ensured that students would view them multiple times every day. And the *Washegesic* portrait's location guaranteed that visits to the principal's office, whether for praise or punishment, would always be conducted under Jesus' watchful eye. See 33 F.3d at 681. Thus, students had to submit to unwanted religious messages as the price of attending the public schools.

2. Religious displays are also all too common in courthouses. While not *formally* barring access to the courts any more than the displays in *Stone* and *Washegesic* barred school attendance, they can send the message that justice will not be blind to religious doctrine or denomination. Thus, courthouse displays may substantially interfere with the ability of lawyers, litigants, and citizens in general to avail themselves fully of the courts, courthouse services, and ultimately, the system of justice.

Accordingly, this Court struck down Ten Commandments displays in two county courthouses in *McCreary*, where standing was expressly based on the displays' interference with the plaintiffs' use of the courthouse facilities. See *ACLU of Ky.* v. *McCreary County*, 96 F. Supp. 2d 679, 682-83 (E.D. Ky. 2000), and *ACLU of Ky.* v. *Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005). And the basis for standing appears to have been the same in *Allegheny*, in which this Court struck down a solitary crèche on a county courthouse's main staircase, where "the county supplie[d] [only] a dolly and minimal aid" to the church

that owned and set up the display. *ACLU Greater Pittsburgh Chapter* v. *County of Allegheny*, 842 F.2d 655, 657 (3d Cir. 1988), aff'd in part and rev'd in part, 492 U.S. 573 (1989).[9]

The harms to courthouse visitors were especially grievous in *Glassroth* v. *Moore*, 335 F.3d 1282,1284-85 (11th Cir. 2003). In that case, Roy Moore, Alabama's then-chief justice, placed a two-and-a-half-ton Ten Commandments monument in the Alabama State Judicial Building. Moore privately financed and privately installed the monument in order to declare the "'sovereignty of God over the affairs of men'" — by which he meant the "'God of the Holy Bible and not the God of any other religion.'" *Glassroth* v. *Moore*, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002) (quoting Moore), aff'd, 335 F.3d 1282 (11th Cir. 2003). Moore made the Ten Commandments the "centerpiece" of the courthouse rotunda (335 F.3d at 1284-85), motivating visitors and building employees to pray before it (229 F. Supp. 2d at 1295). The lawyer-plaintiffs, "whose professional duties require[d] them to enter the Judicial Building regularly," were thereby made to "feel like outsiders" who were unwelcome in, and lacked equal standing before, the Alabama courts. 335

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[9] The *amici* States contend that the Third Circuit "focused entirely on *taxpayer* standing" in *Allegheny*. States' *Amicus* Br. 5. But, in fact, the court of appeals did not expressly address standing at all. It did, however, observe that, "[i]n view of the crèche's location, it is probably seen by many visitors to the courthouse including taxpayers, lawyers trying cases or serving as arbitrators, litigants, persons desiring to search certain court records, and people with business at the sheriff's office." *Allegheny*, 842 F.2d at 657.

F.3d at 1292. Holding that the plaintiffs therefore had Article III standing (see *id.* at 1291-93), the Eleventh Circuit went on to conclude that Moore had unconstitutionally imbued the courthouse with an "'overwhelming holy aura'" (*id.* at 1296-97 (quoting *Glassroth*, 229 F. Supp. 2d at 1303-04)) — a fact that the government has elsewhere acknowledged (Tr. of Oral Arg. at 51-52, *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (No. 03-1500) (oral argument of Paul D. Clement) (noting that Moore's display "was like a religious sanctuary within the walls of the courthouse," and conceding that "the display * * * probably does cross the constitutional line even under our view").[10]

As the Seventh Circuit recognized in *Doe* v. *County of Montgomery*, 41 F.3d 1156, 1159, 1161 (7th Cir. 1994), those who encounter a religious display upon entering a courthouse to register to vote, obtain an absentee ballot, serve on a jury, or participate as a party in a lawsuit are deprived of the ability to "fulfill certain legal obligations" and to "participate fully as citizens." They are put in the untenable position of having either to relinquish their right of access to the courts, or to use courthouse facilities and services in

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[10] See also, *e.g.*, *ACLU of Fla. Inc.* v. *Dixie County*, 570 F. Supp. 2d 1378 (N.D. Fla. 2008) (finding standing for prospective county resident who encountered six-ton Ten Commandments monument, inscribed with "LOVE GOD AND KEEP HIS COMMANDMENTS," on county-courthouse steps when visiting Register of Deeds); *Harvey* v. *Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (holding that local attorney had standing to challenge courthouse panel inscribed with Ten Commandments and quotations from Jesus), aff'd, 15 F.3d 1097 (11th Cir. 1994).

the shadow of a visible commitment to "Equal Justice for Christians Only."

3. Nor are the harms from religious displays in public parks insignificant, as the lower courts have recognized.

In Georgia, for example, a private association was permitted to construct and maintain a 35-by-26-foot, illuminated Latin cross in a state park. *ACLU of Ga.* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 & n.1 (11th Cir. 1983). From its mountaintop site, the cross was "visible for several miles from the major highways which traverse[d] the" area; and it flooded park campsites with "light almost bright enough to enable one to read at night." *Id.* at 1101, 1103. Georgia's cross was also plainly visible to a Unitarian minister at his church's retreat and conference center — *in North Carolina*. *Id.* at 1103 n.9. The Eleventh Circuit concluded that campers had standing to challenge the donated cross because they were "forced to locate other camping areas or to have their right to use [the] State Park conditioned upon the acceptance of unwanted religious symbolism"; and the minister had standing because he suffered the "particularly disturbing and intrusive" injury of having the county's cross "manifest[] itself at his special place of religious contemplation and retreat." *Id.* at 1108.

4. In many such cases, the plaintiffs suffered stigmatic injuries because the government aligned itself with a faith different from theirs. But this Court has never hesitated to consider Establishment Clause claims on the merits, and to recognize violations, where the government has endorsed or advanced the religion

to which the plaintiffs themselves subscribe. See *Lee* v. *Weisman*, 505 U.S. 577, 581, 584 (1992) (Jewish parent had standing to challenge Jewish prayer at public-school graduation).[11]

That those who venerate a religious symbol may, under appropriate circumstances, challenge its official use or misuse accords with the Framers' basic intent that the Establishment Clause safeguard freedom of conscience against governmental intrusions. See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421, 431-32 (1962) ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5, reprinted in *Everson* v. *Board of Educ.* 330 U.S. 1, 63-72 (1947) (appendix to dissenting opinion of Rutledge, J.)). A Christian's objection to a governmental display of a cross, but not to crosses in general, thus lies within the heartland of Establishment Clause concerns.

5. Closing the courthouse doors to those whose religious symbols the State has co-opted, or to those stigmatized by its embrace of another faith's symbols, would insulate many displays from challenge. Often, these displays are created, erected, and maintained with private funds. And even when public money is

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[11] See also, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 294 (2000) (Catholic and Mormon parents successfully challenged Christian prayers at high-school football games); *Allegheny*, 492 U.S. at 651 & n.8 (Stevens, J., dissenting) (noting that Jewish plaintiff challenged menorah display).

spent to create or maintain a religious display on public land, a plaintiff's ability to challenge the expenditure as a taxpayer is far from certain. See generally *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

In *Gonzales* v. *North Township*, 4 F.3d 1412 (7th Cir. 1993), for example, a town accepted an 18-foot, wood-and-terra-cotta crucifix from the Knights of Columbus, and displayed it in Wicker Memorial Park, over the objections of several ministerial associations. *Id.* at 1414-15. Town residents who used the park were permitted to challenge the display because their use and enjoyment of the park was diminished. *Id.* at 1416-17. But they lacked standing as taxpayers because there had been no public expenditure. *Id.* at 1416.

Likewise, the Ten Commandments displays in the public schools in *Stone* were procured using private contributions (449 U.S. at 39), and the Jesus portrait in the public school in *Washegesic* was privately donated (33 F.3d at 681). Thus, there would have been no taxpayer standing, and no basis to sue other than for the harms associated with students' "continuing direct contact" with the displays. *Id.* at 683. Similarly, the granite Ten Commandments monument in *Glassroth* and the illuminated cross in *Rabun County* were both donated by private parties. See *Glassroth*, 335 F.3d at 1285; *Rabun County*, 698 F.2d at 1101. If the plaintiffs' injuries in those cases — diminished enjoyment of public property — had been deemed insufficient, the displays would have been immune from judicial review.

6. Even when plaintiffs also have taxpayer standing, a pocketbook-injury claim may not adequately capture the nature or full extent of the harm that they suffer. New Mexico's Bernalillo County undoubtedly expended public funds to adorn county vehicles, official documents, and sheriffs' uniforms with its seal — a blazing Latin cross and the motto, "With This We Conquer." See *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc). But the principal injury that the non-Christian plaintiff alleged was that he was everywhere subjected to an "anathematical" expression of the city's favoritism toward Christianity. See *Johnson* v. *Board of County Comm'rs*, 528 F. Supp. 919, 920-21 (D.N.M. 1981), rev'd sub nom. *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc).[12] While the pocketbook injury was, we think, substantial in its own right, it would likely have been the last thing on the plaintiff's mind if he called the police in an emergency, only to have them arrive in crusaders' livery.

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[12] See also, *e.g.*, *Harris* v. *City of Zion*, 927 F.2d 1401, 1403-05 (7th Cir. 1991) (city seal, which appeared on everything from vehicle-tax stickers to water tower, bore slogan "God Reigns" on ribbon draped across shield featuring Latin cross, dove carrying branch, sword and crown, and city's name); *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (city displayed 35-by-18-foot, illuminated Latin cross atop fire station, causing city residents to alter their routes of travel to avoid it); *Mendelson* v. *City of St. Cloud*, 719 F. Supp. 1065, 1068 (M.D. Fla. 1989) (illuminated Latin cross atop city water tower was visible throughout community, causing plaintiff to avoid areas of town and businesses lying "in the 'shadow of the cross,'" and to drive his daughter to school via circuitous rout

7. To be sure, not all displays involving religious symbols will be held unlawful. In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), for example, this Court upheld a Ten Commandments display near the Texas Supreme Court and State Capitol buildings, where standing was premised on the fact that the lawyer-plaintiff could not use the court's library without viewing the monument. *Van Orden* v. *Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002), aff'd, 351 F.3d 173 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005). But close cases like *Van Orden* just underscore that Establishment Clause actions turn on careful review of the facts (*McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key")), and hence, that they should generally be decided on the merits rather than disposed of with a flat jurisdictional bar. The parents in *Stone* (who sought to spare their children a religious message at odds with their own beliefs), the minister in *Rabun County* (who wished to protect his spiritual retreat from intrusion by Georgia's religious imagery), and the citizen in *Friedman* (who wanted to ensure that he would receive the same police protection as Christians did) deserved to have their claims heard.

8. In urging an extreme jurisprudential change of course, Petitioners' *amici* characterize the basis for standing in religious-display cases as *sui generis*. See, *e.g.*, ACLJ's *Amicus* Br. 2. But putting citizens to the untenable choice either to acquiesce in the government's subjecting them to its message of religious favoritism (and its derogation, through co-optation, of the sacred symbols of the favored faith), or else to forgo their rights to use and enjoy the property (cf. *Valley Forge*, 454 U.S. at 486 n.22), mirrors those

injuries that this Court has deemed sufficient for standing purposes in other contexts.

This Court has repeatedly reaffirmed, for example, that when governmental action affects public land, those whose enjoyment of that land is diminished meet Article III's injury-in-fact requirement. See, *e.g.*, *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (although "generalized harm to * * * the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice"); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 566-67 (1992) (threatened harm to animals that one observes confers standing to challenge agency's interpretation of environmental regulation); *United States* v. *SCRAP*, 412 U.S. 669, 688-89 (1973) (persons who use parks from which more resources may be extracted and in which more refuse will be discarded because of federal action suffer "specific and perceptible harm" for standing purposes); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-35 (1972) ("impair[ing] the enjoyment" of national park by "adversely affect[ing] the scenery" is cognizable injury to those who use park (internal quotation marks omitted)). And contrary to the contentions of Petitioners' *amicus* the Becket Fund (see Becket Fund's *Amicus* Br. 10), this Court has expressly and consistently held that plaintiffs have standing where governmental action diminishes their subjective enjoyment of public land but does not physically impede their use of it. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (standing existed where factory discharge made river look and smell unappealing);

Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) (standing existed where presence of nuclear reactor caused concern over possibility of radiation exposure and where discharged water raised lake's temperature).[13]

Undoing Establishment Clause standing would not only sweep away a longstanding, settled body of law (see App. B), but also place Establishment Clause jurisprudence out of step with broader standing doctrine. As the D.C. Circuit has explained, "[p]laintiffs [a]re entitled, as members of the public, to enjoy [public] land * * *; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional." *Allen* v. *Hickel*, 424 F.2d 944, 947 (D.C. Cir. 1970) (rejecting government's argument that "if the plaintiffs didn't like to look at the crèche, they could avoid walking near the Ellipse").

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[13] Although a religious display on public property may literally displace plaintiffs from only a small segment of the land, that is no different from when a road is run through pristine wilderness, as in *Sierra Club*, 405 U.S. at 734-35; and it is a much greater impediment than when litter increases, as in *SCRAP*, 412 U.S. at 688-89. In each case, the government has caused an aesthetic change that negatively affects users' enjoyment of the land.

II. The District Court Did Not Abuse Its Discretion In Determining That The Land Transfer Is Inadequate To Cure The Constitutional Violation.

A. District courts have substantial discretion to fashion and implement remedies.

When a district court finds a constitutional violation, it "has a duty to command a remedy that is effective, and it enjoys the broad equitable authority necessary to fulfill this obligation." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 399 (1992). The district court thus has broad discretion to craft an appropriate remedy, taking all the case's facts and circumstances into account. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 87 (1995) ("discretion * * * must necessarily adhere in a district court in fashioning a remedy"); *Rufo*, 502 U.S. at 402-03 ("The duty of the District Court is * * * to consider the various interests involved and, in the sound exercise of its discretion, to fashion the remedy that it believes to be best."); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770 (1976) ("The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts.").

The commitment to the district court of both the duty and the discretion to fashion remedies makes perfect sense. The district court knows the facts; it knows the parties; and it has lived with both through every procedural stage of the litigation. Consequently, it "is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands'" in the particular circumstances before it.

United States v. *Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)).

Here, the district court has managed this litigation since March 2001, issuing the injunction that it deemed most appropriate. It then determined in the subsequent enforcement proceeding that the transfer statute (Pet. App. 147a-148a (Pub. L. No. 108-87, § 8121, 117 Stat. 1054, 1100 (2003))) was an inadequate substitute for the injunction (see Pet. App. 89a). That determination is likewise properly committed to the sound discretion of the district judge because, "having had the parties before [him] over a period of time, [he] was in the best position to judge whether an alternative remedy * * * would have been effective in ending petitioners' [unconstitutional] practices." *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) (quoted in *Paradise*, 480 U.S. at 184). This Court should not substitute its judgment for that of the district judge, whose "proximate position and broad equitable powers mandate substantial respect for this judgment." *Paradise*, 480 U.S. at 184. See generally, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (standard of review for appropriateness of equitable remedy is "the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case" (quoting *Langnes* v. *Green*, 282 U.S. 531, 534 (1931))).

B. The district court did not abuse its discretion in finding that the land transfer is a sham transaction.

Whether a sale of land provides an adequate remedy for an unconstitutional governmental display will depend on the nature and location of the display, the parties' behavior in the litigation, and the terms and circumstances of the sale. To be sure, a sale can sometimes be "an effective way for a public body to end its inappropriate endorsement of religion." *Freedom From Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). But selling the land in a transaction that is designed to ensure the display's retention, without doing anything to inform the public of the transfer, perpetuates rather than corrects the wrong. Thus, the district court's conclusion — that a halfhearted land sale was an inadequate remedy for a 75-year constitutional violation — was not an abuse of the court's discretion.

1. In some cases, a sale of any kind will be an inadequate remedy. The government could not, for example, replace the Statue of Freedom atop the U.S. Capitol dome with a large Latin cross, and then insulate the display from constitutional scrutiny by selling the spot to a private party — even if the dome were adorned with an elaborate disclaimer. Nor should governmental authorities be able to sell a public school's lobby or a county courthouse's staircase to permit the erection of religious statues there, no matter how emphatically disclaimed the displays might be. Those locations are simply too closely aligned with the government to permit their privatization.

2. In other instances, even if a sale might otherwise have been permissible, a litigant's behavior may suggest that the transaction is not a legitimate effort to divorce the government from a display, but is instead a dilatory or obstructionist tactic to ensure that the display remains in place. Here, the injunction — which prohibits Petitioners from "permitting display of the Latin cross" — was entered seven years ago, in July 2002. Pet. App. 58a. But Congress forbade the expenditures required to comply. J.A. 45; Pet. App. 60a. The injunction was affirmed by the court of appeals over five years ago, with that court explicitly holding that the land-transfer statute did not moot the case because the land might revert to the government. See Pet. App. 102a-104a. Petitioners did not seek rehearing or *certiorari* review of that judgment, and the injunction became final. Yet Petitioners did not comply; nor did they file a Rule 60(b) motion to lift or modify the injunction. See Fed. R. Civ. P. 60(b). Rather, they waited for Respondent to move to enforce the injunction, which they took as an opportunity to revisit all aspects of the litigation — including the threshold question whether Respondent had the right to sue in the first place. Under those circumstances, the sale was reasonably viewed with suspicion by the district court, whose proximity to and familiarity with the case uniquely qualified it to assess the government's motivations. See *Paradise*, 480 U.S. at 170-71 (nature and extent of remedy properly affected by defendant's resistance to court's order).

3. The terms of a sale may further underscore that the government's agenda is to "reach[] for any way to keep a religious [item] on [display]." *McCreary*, 545

U.S. at 873. So, for example, a government's decision to sell land lying directly under and adjacent to a display, while retaining ownership of all the surrounding land, should be viewed as an impermissible gerrymander that fails sufficiently to divorce the government from its past action. See, *e.g.*, Pet. App. 85a ("Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve — like a donut hole with the cross atop it — will do nothing to minimize the impermissible governmental endorsement."). Judicial skepticism is similarly warranted where the government retains an interest in the land or encourages the buyer to retain the display — particularly where the government also continues to confer on the display the special status reserved for the nation's most important icons (see Resp. Br. 37-41 (explaining national-memorial designation)). And where the government structures a transaction to all but guarantee the display's retention (see *id.* at 37-54), it is entirely reasonable for the district court to deem the land transfer a sham (Pet. App. 65a, 90a-98a).

4. The retention of a display is all the more egregious when nothing is done to inform viewers of the transfer. Under the terms of the land transaction here, the cross does not move; the government does not erect any fences or signs to mark the Preserve's supposed new boundary or to disclaim the cross and the religious message that it conveys; and the VFW has no duty to distinguish the parcel from the surrounding federal lands or to claim the cross as purely private speech. In short, there are no visual cues of any kind that the cross's 75-year status has changed. Thus,

visitors to the Preserve would naturally and reasonably continue viewing the cross as communicating the same exclusionary message that it always has.

5. The courts of appeals have thus consistently recognized that for a land sale to remedy past governmental endorsement of religion, there must be a readily apparent, visual divorce of the now-private display from the surrounding public property. In *Marshfield*, for instance, the Seventh Circuit held that a sale of parkland with a towering, marble Jesus statue was inadequate, in part because the transferred property was "not physically differentiated from the surrounding public park, and no visual boundaries * * * exist[ed] that would inform the reasonable but unknowledgeable observer that the * * * property should be distinguished from the public park." 203 F.3d at 494. On remand, the district court ordered erection of a fence and signs clearly designating the parcel as private, and disclaiming official endorsement of the display. See *Freedom From Religion Found.* v. *City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at *1 (W.D. Wis. May 9, 2000). In *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 700-04 (7th Cir. 2005), the Seventh Circuit approved similar demarcation of a transferred parcel with a Ten Commandments monument as a valid cure, in part because all indicia of governmental sponsorship of the monument had been not only removed, but publicly and permanently repudiated with signs and fences. And in *Kong* v. *City of San Francisco*, 18 Fed. App'x 616, 618 (9th Cir. 2001), the Ninth Circuit approved a sale because the parcel with the religious display was

"visually differentiate[d]" from the surrounding park, the display itself was for the most part visible only from the private parcel, and "several signs throughout the park describ[ed] the private nature of the parcel and the circumstances of the conveyance" with sufficient detail to ensure that no one would reasonably conclude that the display was still government sponsored or government approved.[14]

Because signs and fences are the traditional, familiar boundary markers between public and private property, they "help[] remove doubt about [official] approval of" a display. *Pinette*, 515 U.S. at 776 (O'Connor, J., concurring in judgment). And hence, their presence or absence should be an important factor in determining whether the government has ceased to broadcast its past message of religious endorsement. In that regard, this Court recognized just last Term that "[p]ermanent monuments displayed on public property typically represent government speech." *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1132 (2009). Where the government has been both landowner and speaker; where the constitutional injury resides in the official message that it has sent, day after day, with its permanent monument; and where nothing about the parcel, the monument, or the

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[14] See also *Utah Gospel Mission* v. *Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1242-43 (D. Utah 2004) (concluding that sale of portion of city's Main Street to church did not violate Establishment Clause because, among other things, resulting Main Street Plaza "look[ed] significantly different from the public sidewalks" and was marked by signs and other clear visual cues that it was church land rather than public property), aff'd, 425 F.3d 1249 (10th Cir. 2005).

surrounding public land is different after the sale than before, there is more than a mere presumption that the display represents government speech.[15]

6. Nor is Establishment Clause law peculiar in calling for disclaimers to cure or mitigate the effects of harmful messages that the defendant has previously communicated to the public. On finding liability for making false or misleading claims about a product under the Lanham Act (15 U.S.C. §1125(a)), courts have required offending firms to publish corrective advertisements or otherwise to inform consumers to disregard the prior claims. See, *e.g.*, *Energy Four, Inc.* v. *Dornier Med. Sys., Inc.*, 765 F. Supp. 724, 735 (N.D. Ga. 1991) (requiring distribution of court-authored notice to all customers of both parties); *Alpo Petfoods, Inc.* v. *Ralston Purina Co.*, 720 F. Supp. 194, 215 (D.D.C. 1989) (requiring dissemination of court-approved "corrective release" to those who received information containing false claim), rev'd in part on other grounds, 913 F.2d 958 (D.C. Cir. 1990); *Upjohn Co.* v. *Riahom Corp.*, 641 F. Supp. 1209, 1226 (D. Del. 1986) (requiring that product packaging include statement correcting manufacturer's prior false claims); Thomas C. Morrison, *Corrective Advertising as a Remedy for the False Advertising of Prescription Drugs and Other Professionally-Promoted Medical*

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[15] Because this case concerns whether the government has adequately divorced itself from its past religious speech (in the form of a permanent monument) and has never involved a public forum, there is no risk that fences, boundary signs, or official disclaimers might be mistakenly perceived as unconstitutional discrimination against private, religious speech. Cf. *Pinette*, 515 U.S. at 769 (plurality opinion).

Products, 49 FOOD & DRUG L.J. 385, 390 & n.22 (1994) (describing *Abbott Labs* v. *Mead Johnson & Co.*, No. 91-202C (S.D. Ind. Aug. 18, 1992), which required publication of court-approved statement in all journals in which false claims had appeared, and mailing of statement to all who had received brochure containing false claims). As one court explained, simply ceasing to make misleading claims is insufficient corrective action where the claims have "left a lingering impression" on persons exposed to them. See *Alpo Petfoods*, 720 F. Supp. at 215.

Libelous statements can likewise linger in the minds of those who read them, continuing to injure long after further defamation has been enjoined, unless the defendant prints a retraction. Thus, at least 31 states have enacted statutes that recognize the importance of countering expression-related injuries with corrective speech, by providing for reduced damages where defamatory statements are retracted using means commensurate with those used to communicate the original statements. See Allison E. Horton, Note, *Beyond Control? The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1294-95 & n.136 (2009).

The lingering effects are no less real — and the need for affirmative measures to dispel them are no less critical — where, every day for 75 years, the government has advertised an unconstitutional message of religious favoritism that has stigmatized members of minority faiths, debased the sacred symbols of the majority, and deprived both groups of the full use and enjoyment of public lands.

CONCLUSION

According to petitioners' *amici*, "[t]his case is only the most extreme example of a phenomenon that has plagued the federal courts," with "[i]deologically motivated citizens" roaming the countryside in search of religious symbols, hoping to "make a federal case out of offense at the display[s]" they find. ACLJ's *Amicus* Br. 4. On gaining access to the courts, these "delicate plaintiffs with eggshell sensitivities" obstinately insist that religious displays "be gutted" (see Cal. Am. Legion's *Amicus* Br. 3, 17), with no regard for "those who will be truly harmed in a *real* way by the [displays'] destruction" (see TMLJ's *Amicus* Br. 5).

On that view, Establishment Clause plaintiffs are little better than B-movie vampires: They suck the life's blood out of communities, corrupting and destroying everything good and holy, yet cower in fear at the mere mention of a cross. The caricature and the attendant trivialization of claims over official religious displays elide the fact that one cannot use and enjoy public lands or facilities fully, as an equal citizen, when the price of entry is stigmatization as a disfavored outsider, or else governmental co-optation, and thus degradation, of the signs and symbols that one holds sacred. To curtail those harms, the government cannot simply delegate to a private party the broadcasting of the unconstitutional message. It must clearly, publicly, and permanently disavow its past speech. That it has not done.

Accordingly, the judgment below should be affirmed.

Respectfully submitted.

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JULY 2009

APPENDIX

APPENDIX A

DESCRIPTIONS OF THE *AMICI*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases decided by this Court and the lower federal and state courts nationwide.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting anti-Semitism, hatred, discrimination, and all forms of bigotry. ADL believes that its stated goals, as well as the general stability of our democracy, are well-served through strict separation of church and state, and commensurately strict enforcement of the Free Exercise Clause.

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is

essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

Jewish Council for Public Affairs

The Jewish Council for Public Affairs, the coordinating body of 14 national and 127 local Jewish community-relations organizations, was founded in 1944 by the Jewish federation system to safeguard the rights of Jews throughout the world, and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and to the concept of separation of church and state as an essential buiwark for religious freedom in the United States.

Military Religious Freedom Foundation

The Military Religious Freedom Foundation is dedicated to ensuring that all members of the United States Armed Forces fully receive the constitutional guarantees of religious freedom to which they and all Americans are entitled by virtue of the Establishment Clause of the First Amendment. MRFF believes that

religious faith is a constitutionally guaranteed freedom that must never be compromised, except in the most limited of military circumstances, because of its fundamental importance to the preservation of the American nation and the American way of life. Additionally, MRFF adheres strongly to the principle that religious faith is a deeply personal matter, and that no American has the right to question another American's beliefs as long as they do not unwontedly intrude on the public space or the privacy or safety of another individual.

North American South Asian Bar Association

The North American South Asian Bar Association is an umbrella organization of 27 regional bar associations across North America, representing the interests of over 6,000 attorneys. NASABA is the principal voice for attorneys of South Asian descent, who illustrate the same broad and diverse range of religious backgrounds as the pluralistic heritage of the United States. NASABA takes an active interest in issues that affect the constitutional rights of ethnic, racial, and religious minorities.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide.

PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. PFAWF has joined in filing this amicus curiae brief in order to help ensure the continued vitality of the First Amendment principle that government must not be permitted to favor one religion over another.

Union for Reform Judaism

The Union for Reform Judaism is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews.

The Union has long maintained a firm commitment to the principle of separation of church and state, in the belief that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history. The government's sponsorship of religious symbols threatens the principle of separation of church and state, which is indispensable to the preservation of that spirit of religious liberty, a unique blessing of American democracy.

APPENDIX B

RELIGIOUS-DISPLAY CASES INVOLVING STANDING TO SUE FOR HARMS TO THE RIGHT TO USE AND ENJOY PUBLIC LANDS

The federal courts have decided scores of Establishment Clause challenges to religious displays on the merits, where standing was premised wholly or partly on the harms to the plaintiffs' use and enjoyment of public lands or facilities. Whether, in the end, the plaintiffs won or lost their suits, each case turned on the nature and history of the challenged display, as well as the context in which it appeared. What follows is a list of all the display cases decided on the merits that *amici* have been able to identify as involving that form of standing, using Westlaw searches of both published and unpublished decisions. We have excluded state-court actions because of the inapplicability of Article III's jurisdictional requirements; and we have excluded the federal cases in which the only asserted or recognized basis for standing was some other theory, such as taxpayer status. The descriptions draw, as appropriate, on prior rulings in each case.

U.S. Supreme Court Cases:

McCreary County v. *ACLU of Ky.*, 545 U.S. 844 (2005), aff'g 354 F.3d 438 (6th Cir. 2003), aff'g 145 F. Supp. 2d 845 (E.D. Ky. 2001), modifying *ACLU of Ky.* v. *McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000): Where plaintiffs challenged Ten Commandments displays in county courthouses, the district court held they had standing because they would necessarily

encounter the displays whenever they entered the courthouses to conduct civic business. The courts enjoined the displays, and both the Sixth Circuit and this Court affirmed, concluding, in light of history and context, that the displays had a predominantly religious purpose.

Van Orden v. *Perry*, 545 U.S. 677 (2005), aff'g 351 F.3d 173 (5th Cir. 2003), aff'g No. A-01-CA-833-H, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002): An atheist who frequently used the Texas Supreme Court's law library challenged a Ten Commandments monolith on the grounds of the State Capitol, which was adjacent to the library. The district court held he had standing because he was subjected to the monolith whenever he used the library, and took offense at the state's perceived preference for religion over nonreligion. The district court, the Fifth Circuit, and this Court all upheld the monolith, which shared the Capitol grounds with 16 other monuments and 21 historical markers, in a nonreligious setting, and prominently acknowledged its private donor.

County of Allegheny v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), aff'g in part and rev'g in part 842 F.2d 655 (3d Cir. 1988): Local residents challenged two privately-owned holiday displays erected on public property in downtown Pittsburgh: a solitary crèche on the county courthouse's main staircase, and a menorah displayed alongside secular symbols on the city-county building's exterior steps. The Third Circuit held that both displays impermissibly endorsed religion. This Court affirmed with respect to the crèche but not the menorah, based

on the displays' different meanings, messages, and contexts.

Stone v. *Graham*, 449 U.S. 39 (1980), rev'g 599 S.W.2d (Ky. 1980): Several plaintiffs — including students, a teacher-parent, and a rabbi — challenged a Kentucky statute requiring that copies of the Ten Commandments, purchased with private funds, be posted in every public-school classroom in the state. An equally divided state supreme court upheld the trial court's determination that the statute was constitutional, but this Court reversed, concluding that the statute's preeminent purpose was religious because the only conceivable effect of posting the Ten Commandments in every public-school classroom would be to make children reflect on, and perhaps venerate, an inherently religious text.

U.S. Courts of Appeals Cases:

Green v. *Haskell County Bd. of Comm'rs*, 568 F.3d 784, (10th Cir. 2009), rev'g 450 F. Supp. 2d (E.D. Okla. 2006): A county resident sued after the county permitted a private party to install a Ten Commandments monolith, also inscribed with the Mayflower Compact, on the courthouse lawn. The district court held that the plaintiff had standing because he was subjected to the monument when compelled to visit the courthouse for business, and the Tenth Circuit agreed, going on to strike down the display.

Weinbaum v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), aff'g 465 F. Supp. 2d 1164 (D.N.M. 2006), and *Weinbaum* v. *Las Cruces Pub. Sch.*, 465 F. Supp.

2d 1182 (D.N.M. 2006): In two separate cases, the parent of a public-school student and other non-Christian Las Cruces residents challenged the city's official seal, the local school district's emblem, and a permanent mural in an elementary school — all of which bore three Latin crosses. In the suit against the city, the district court held that the plaintiffs had standing based on their ongoing, direct, personal contact with the symbols, which appeared on monuments, signs, flags, uniforms, vehicles, and buildings. Consolidating the cases on appeal, the Tenth Circuit held that the plaintiffs had standing based on their constant exposure to the three-cross emblems, but held that the emblems were constitutional because they simply signified the city's name and history.

Card v. *City of Everett*, 520 F.3d 1009 (9th Cir. 2008), aff'g 386 F. Supp. 2d 1171 (W.D. Wash. 2005): A local resident challenged Everett's display of an Eagles-donated Ten Commandments monolith on the grounds of its Old City Hall. The monolith, which was partially obscured by shrubbery, shared the grounds with a plaque and three large war memorials, and several statues and monuments stood in the park across the street. Both the district court and the Ninth Circuit concluded that the monument and the context in which it was displayed were virtually indistinguishable from those in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and accordingly upheld the display.

Vasquez v. *Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007): A county resident and employee sued after the county modified its official seal, removing a cross and making other changes. The Ninth Circuit held that he

had standing because, as an employee, he had daily contact with the seal. But the court held that the cross's removal was constitutionally permissible.

Skoros v. *City of New York*, 437 F.3d 1 (2d Cir. 2006), aff'g No. CV-02-6439 (CPS), 2004 WL 5570287 (E.D.N.Y. Feb. 18, 2004): Two Roman Catholic public-school students and their mother challenged holiday displays at their school, as well as the policy governing those displays. The policy required all holiday displays to include symbols from multiple cultural traditions, proscribed the use of religious symbols, and expressly permitted use of the menorah and star-and-crescent. Both the district court and the Second Circuit upheld the policy and the displays.

O'Connor v. *Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005), aff'g in part and rev'g in part 305 F. Supp. 2d 1217 (D. Kan. 2004): A professor and a student, both Roman Catholic, sued to enjoin their university's display of a 37-inch bronze statue of a bishop wearing a phallic miter as part of the university's annual, outdoor exhibit of sculptures. The district court held that the plaintiffs had standing based on their direct, personal contact with the statue, but found no constitutional violation. The Tenth Circuit agreed, affirming both rulings.

ACLU of Ky. v. *Mercer County*, 432 F.3d 624 (6th Cir. 2005), aff'g 240 F. Supp. 2d 623 (E.D. Ky. 2003): A county resident sought to enjoin the installation in the Mercer County courthouse of a "Foundations of Law" display identical to the final display considered in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). The county had never previously displayed the

Ten Commandments in the courthouse. The district court granted summary judgment to the county, and the Sixth Circuit affirmed based on *McCreary*.

Books v. *Elkhart County*, 401 F.3d 857 (7th Cir. 2005): Where a county's display of the Ten Commandments in its administrative building alongside several other, identically-sized historical documents, the U.S. and state flags, and an explanatory plaque, a county resident and regular visitor to the building sued. The Seventh Circuit held that he had standing because he had to come into direct and unwelcome contact with the display to access county services, but it concluded that the display was constitutional.

Mercier v. *Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), rev'g *Mercier* v. *City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003): After nearly two dozen individual plaintiffs who lived or worked in La Crosse sued to enjoin the display of a donated Ten Commandments monument in a city park, the city sold the monument and the land beneath it to the monument's donor. After concluding that the plaintiffs had standing, the district court held that the monument was unconstitutional. The Seventh Circuit reversed on the merits.

Lambeth v. *Bd. of Comm'rs*, 407 F.3d 266 (4th Cir. 2005), aff'g 321 F. Supp. 2d 688 (M.D.N.C. 2004): Two attorneys who regularly practiced in the courts located in Davidson County's government center challenged the county board's decision to inscribe the national motto, "In God We Trust," on the front of the building. Because the plaintiffs regularly encountered the inscription in the course of their professional activities,

the district court held they had standing; but it dismissed their complaint for failure to state a claim. The Fourth Circuit affirmed, holding that the inscription was clearly constitutional.

Modrovich v. *Allegheny County*, 385 F.3d 397 (3d Cir. 2004): Two county residents who were atheists challenged a donated bronze plaque inscribed with the Ten Commandments and other biblical passages, which was displayed among various commemorative plaques on the county courthouse's exterior wall. The plaintiffs encountered the plaque when walking to and from work and when entering the courthouse on errands. The district court granted summary judgment to the county, and the Third Circuit affirmed, holding that the plaque's display was constitutional.

ACLU Neb. Found. v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), rev'g 186 F. Supp. 2d 1024 (D. Neb. 2002): An atheist who was a city resident challenged the display of a donated Ten Commandments monument in a city park, contending he limited his use of the park because of the monument's presence. The district court held that he had standing, and that the display was unconstitutional. The Eighth Circuit reversed the merits ruling and upheld the monument.

McGinley v. *Houston*, 361 F.3d 1328 (11th Cir. 2004), aff'g 282 F. Supp. 2d 1304 (M.D. Ala. 2003): Plaintiffs sued when, in accordance with the Eleventh Circuit's decision in *Glassroth* v. *Moore*, 335 F.3d 1282 (11th Cir. 2003), the associate justices of the Alabama Supreme Court removed a two-and-a-half ton, granite Ten Commandments monument that the state's chief

justice had installed in the state judicial building's rotunda. Both the district court and the Eleventh Circuit concluded that the display's removal was constitutionally permissible.

ACLU of Ohio Found. v. *Ashbrook*, 375 F.3d 484 (6th Cir. 2004), aff'g 211 F. Supp. 2d 873 (N.D. Ohio 2002): The ACLU sought to enjoin a county-court judge's display of a Ten Commandments poster in his courtroom beside an identically sized Bill of Rights poster. Both the district court and the court of appeals held that the ACLU had standing because one of its Ohio members, an attorney, regularly practiced law in that courtroom and averred that the poster negatively affected his use of the facility. Affirming the district court, the Sixth Circuit concluded that the display was unconstitutional.

Baker v. *Adams County/Ohio Valley Sch. Bd.*, Nos. 02-3776, 02-3777, 2004 WL 68523 (6th Cir. Jan. 12, 2004), aff'g No. 1:99-CV-94 TSH, 2002 WL 33957387 (S.D. Ohio June 11, 2002): After the county school board erected Ten Commandments monuments at the entrances to four public high schools, a county resident and a student's parent sued. The board then surrounded each monument with four monuments inscribed with religious excerpts from documents with legal significance. Both the district court and the court of appeals concluded that the plaintiffs had standing because they encountered the displays while visiting the schools for events, or while passing them on public roads. Affirming the district court, the Sixth Circuit held that the displays were unconstitutional.

Briggs v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003): After Mississippi adopted a new design for its state flag that included the St. Andrew's Cross – a component of the Confederate battle flag – a state resident sued. Both the district court and the Fifth Circuit concluded that the flag's design was constitutionally permissible.

ACLU of Ky. v. *McCreary County*, 354 F.3d 438 (6th Cir. 2003), aff'g *Doe* v. *Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000), cert. denied, *Harlan County* v. *ACLU of Ky.*, 545 U.S. 1152 (2005): A public-school student and her parents challenged the presence of Ten Commandments displays in classrooms at her school. After they filed suit, the school added religious excerpts from other historical documents to the displays. The district court held that the plaintiffs had standing because the student had daily contact with the displays, and her parents encountered them when they attended parent-teacher conferences and other meetings. On the merits, the court held that even as modified, the displays were unconstitutional. The Sixth Circuit affirmed in a decision consolidated with the two cases involving the courthouse displays that this Court struck down in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005).

Glassroth v. *Moore*, 335 F.3d 1282 (11th Cir. 2003), aff'g 229 F. Supp. 2d 1290 (M.D. Ala. 2002): After Roy Moore, the ten-chief-justice of the Alabama Supreme Court, installed a two-and-a-half ton, granite Ten Commandments monument in the Alabama State Judicial Building's rotunda, three lawyers who regularly used the courthouse sued. The district court

held that they had standing. Because two of lawyers had altered their behavior to limit or avoid further direct contact with the monument, the Eleventh Circuit affirmed. On the merits, both the district court and the court of appeals concluded that the display was unconstitutional.

King v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003): A county resident challenged the inclusion on a court clerk's seal, used solely to authenticate documents, of an outline of the Ten Commandments. The Eleventh Circuit held that the seal was constitutional.

Freethought Soc'y of Greater Phila. v. *Chester County*, 334 F.3d 247 (3d Cir. 2003), rev'g 191 F. Supp. 2d 589 (E.D. Pa. 2002): A county resident who was an atheist challenged a donated Ten Commandments plaque that had been affixed to an exterior wall of the county courthouse for decades. The district court held that she had standing because, as a county resident, she often had unwelcome, direct contact with the display when she visited the courthouse to serve as a juror or witness, to transact other business, and to participate in demonstrations. The district court held that the plaque was unconstitutional, but the Third Circuit reversed on the merits.

Adland v. *Russ*, 307 F.3d 471 (6th Cir. 2002), aff'g 107 F. Supp. 2d 782 (E.D. Ky. 2000): Kentucky passed a law requiring relocation of a Ten Commandments monument, previously displayed on the State Capitol grounds, so that it would be included in "a historical and cultural display" designed to "remind Kentuckians of the Biblical foundations" of the state's laws. Several

frequent visitors to the State Capitol grounds challenged the proposed display, and both the district court and the Sixth Circuit held that the plaintiffs had standing because they anticipated direct, personal contact with the display in the course of their regular activities. Both courts also held that the planned display was unconstitutional.

Paulson v. *City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc): In *Ellis* v. *City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), a San Diego resident had brought state and federal constitutional claims against San Diego's display of a 43-foot Latin cross atop Mt. Soledad, on city property; and the Ninth Circuit had held that the cross violated the California Constitution. To comply with the resulting injunction, the city sold the land beneath the cross to the private party that had originally erected the display. The plaintiff moved to enforce the injunction, and the district court held that the sale did not cure the violation. After a competitive-bidding process, the city selected the same private party as the winning bidder. This time, the district court held that the city had cured the violation; but the Ninth Circuit reversed.

Indiana Civil Liberties Union v. *O'Bannon*, 259 F.3d 766 (7th Cir. 2001), aff'g 110 F. Supp. 2d 842 (S.D. Ind. 2000): State employees sought a preliminary injunction barring the installation of a Ten Commandments monument, which also had the Bill of Rights and the Indiana Constitution's Preamble inscribed on it, in a park outside the State Capitol building, where the employees worked. Both the district court and the Seventh Circuit concluded that although the Capitol

grounds and a nearby park featured other monuments, those monuments shared no common theme with the Ten Commandments. As such, the display was unconstitutional.

ACLU of Ohio v. *Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (en banc), aff'g 20 F. Supp. 2d 1176 (S.D. Ohio 1998): A presbyterian minister and the ACLU sought to enjoin the inscription of the Ohio State motto, "With God, All Things Are Possible," on a plaza outside the State Capitol. The district court likened the motto to the national motto and upheld the display, but it did enjoin the state from attributing the motto to the New Testament, which the plaintiffs had shown to be the source of the text. The Sixth Circuit affirmed.

Freedom from Religion Found., Inc. v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000): A local businessman sued to enjoin the display of a donated, fifteen-foot-tall, white marble statue of Jesus along the main thoroughfare through town, in a city park created specifically to accommodate the statue. The city then placed a disclaimer near the statue and sold a tiny plot of land beneath the statue to a private group. The district court concluded that the sale had cured any constitutional violation. The Seventh Circuit reversed, holding that the display remained unconstitutional.

Books v. *City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), rev'g 79 F. Supp. 2d 979 (N.D. Ind. 1999): Elkhart residents challenged a donated Ten Commandments monument displayed on the city municipal building's lawn, where the only other adornment was a smaller war memorial, some distance away. The district court

held that the plaintiffs had standing, but concluded that the monument's display was constitutional. The Seventh Circuit agreed that the plaintiffs had standing because they had to come into direct and unwelcome contact with the monument in order to participate fully as citizens, but it reversed the district court's holding on the merits, striking down the display.

Brooks v. *City of Oak Ridge*, 222 F.3d 259 (6th Cir. 2000): For its fiftieth anniversary, Oak Ridge installed a Japanese "Friendship Bell" in a public park. The bell, which resembled those found in Buddhist temples, was meant to memorialize the deaths of Japanese civilians killed by nuclear blasts in WWII, and to express hope for a more peaceful future. Affirming the district court, the Sixth Circuit held that there was no constitutional violation.

Granzeier v. *Middleton*, 173 F.3d 568 (6th Cir. 1999), aff'g 955 F. Supp. 741 (E.D. Ky. 1997): County residents, who regularly conducted business at the county courthouse, sued after the county posted a sign, emblazoned with a crucifix, to inform visitors that the courthouse would be closed "IN OBSERVANCE OF GOOD FRIDAY." After holding that the plaintiffs' regular courthouse use and contact with the sign conferred standing, the court found that the sign was unconstitutional, but that closure on Good Friday was not. The plaintiffs appealed the latter holding and Sixth Circuit affirmed.

ACLU v. *City of Florissant*, 186 F.3d 1095 (8th Cir. 1999), rev'g 17 F. Supp. 2d 1068 (E.D. Mo. 1998): A non-Christian city resident — who lived three blocks from the city's civic center and regularly visited and

traveled past it — sued to enjoin the inclusion of a near-life-size nativity scene in the center's holiday display. The city then added numerous secular symbols to the display. Determining that the original display was unconstitutional, the district court also held that the additions had not cured the violation. Focusing strictly on the modified display, the Eighth Circuit reversed.

ACLU of N.J. v. *Schundler*, 104 F.3d 1435 (3d Cir. 1997), aff'g in part and rev'g in part 931 F. Supp. 1180 (D.N.J. 1995), appeal after remand, 168 F.3d 92 (3d Cir. 1999): After encountering the displays as they traveled near or transacted business at city hall, Jersey City residents challenged the city's placement of a lone menorah, and later, its placement of a lone crèche, on the plaza in front of city hall. The city responded by adding a sign praising its residents' diverse cultural heritage and placing a Christmas tree in the vicinity. The district court held that the displays were unconstitutional. The following year, the city displayed the crèche and menorah together, along with various secular holiday symbols, and the Third Circuit concluded that this modified display was constitutional.

Separation of Church & State Comm. v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam): A group of Eugene residents challenged the display of a 51-foot Latin cross on public property adjacent to the city's downtown business district. The cross was originally erected by private parties on public land but later deeded to the city for use as a war memorial. The

district court upheld the cross, but the Ninth Circuit reversed.

Suhre v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997), rev'g *Suhre* v. *Board of Comm'rs*, 894 F. Supp. 927 (W.D.N.C. 1995): A county resident and frequent litigant sought an injunction requiring the removal of a Ten Commandments plaque from the county courthouse's main courtroom, where county board meetings as well as trials were held. The plaintiff, an atheist, claimed that he could not participate in litigation and public meetings without confronting the plaque. The district court held that he lacked standing, but the Fourth Circuit reversed and remanded, holding that the plaintiff's personal contact with state-sponsored religious symbolism comprised a cognizable injury-in-fact, whether or not the plaintiff altered his conduct to avoid the display. On remand, the district court upheld the display.

Elewski v. *City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), aff'g No. 95-CV-1830 (FJS), 1996 WL 31169 (N.D.N.Y. Jan. 19, 1996): A Syracuse resident who was an atheist challenged the city's display of a crèche alongside colored lights, a Christmas tree, wire bells, reindeer, and a privately-owned menorah on public property in the city's downtown area. Both the district court and the Second Circuit held that the crèche's inclusion in the display was constitutionally permissible.

Alvarado v. *City of San Jose*, 94 F.3d 1223 (9th Cir. 2002), aff'g No. C 94-20773 JW, 1995 WL 66785 (N.D. Cal. Feb. 10, 1995): Several San Jose residents sued after the city placed a "Plumed Serpent" sculpture depicting Quetzalcoatl, an Aztec mythological figure, in

a city park as part of a public-artwork program designed to promote the city's diverse heritage. The district court found no constitutional violation, and the Ninth Circuit affirmed.

Carpenter v. *City of S.F.*, 93 F.3d 627 (9th Cir. 1996), rev'g 803 F. Supp 337 (N.D. Cal. 1992): San Francisco residents challenged the display of a 103-by-39-foot Latin cross atop a mountain in a public park. The district court concluded that the cross complied with both the federal and state constitutions. The Ninth Circuit reversed, holding that the display violated the California Constitution's no-preference clause.

American Jewish Congress v. *City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (en banc): Every Chanukah, the city issued a permit to a private Jewish organization to erect a 27-foot, unattended menorah in a public park near city hall. The city exercised considerable discretion over who could obtain a permit. City residents sued, and ultimately, the Ninth Circuit held that the menorah's display was unconstitutional.

Gaylor v. *United States*, 74 F.3d 214 (10th Cir. 1996): Several U.S. citizens and an atheist organization sought to enjoin further use of the national motto and its appearance on U.S. currency. The Tenth Circuit held that the motto and its display are constitutional.

Robinson v. *City of Edmond*, 68 F.3d 1226 (10th Cir. 1995): Jewish and Unitarian residents of Edmond sued to enjoin use of the city's seal, which depicted a steam engine and oil derrick, tower, covered wagon, and Christian cross, and which appeared on city signs, flags, uniforms, vehicles, correspondence, and utility

bills. The Tenth Circuit held that the seal was unconstitutional.

Washegesic v. *Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994), aff'g 813 F. Supp. 559 (W.D. Mich. 1993): A public-secondary-school student challenged the display of a donated, solitary portrait of Jesus in the hallway between his school's gym and principal's office. The Sixth Circuit held that the plaintiff's graduation had not mooted the case because he regularly visited the school to attend sporting events and social functions with his girlfriend, who was still a student, and thus had continuing, personal contact with the portrait. On the merits, it affirmed the district court's ruling that the portrait's display was unconstitutional.

Kunselman v. *Western Reserve Local Sch. Dist.*, 70 F.3d 931 (6th Cir. 1994): Three public-school students and their parents sought to enjoin their school district's adoption of a new mascot, the "Blue Devil," copied from Duke University and named for a WWII corps of French soldiers. The district court and the Sixth Circuit both held that there was no constitutional violation.

Doe v. *County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994), aff'g in part and rev'g in part 848 F. Supp. 832 (C.D. Ill. 1994): Where a donated, permanent metal sign reading "THE WORLD NEEDS GOD" greeted entrants to a county courthouse, a nonresident, who had never seen the courthouse, and two county residents, who visited the courthouse to register to vote, obtain absentee ballots, and serve as jurors, sued. The district court dismissed for lack of standing, but

the Seventh Circuit reversed as to the two residents because they could not participate fully as citizens of the county and fulfill their legal obligations without encountering the sign.

Gonzalez v. *North Twp.*, 4 F.3d 1412 (7th Cir. 1993), rev'g 800 F. Supp. 676 (N.D. Ind. 1992): Residents challenged the display in a public park of an eighteen-foot crucifix donated by the Knights of Columbus. The district court concluded that only one plaintiff, who had quit his job as a park employee to avoid the crucifix, had standing. Because the other plaintiffs avoided the area in the park surrounding the crucifix, the Seventh Circuit concluded that they had standing, too. On the merits, the court of appeals held that the display was unconstitutional.

Kreisner v. *City of San Diego*, 1 F.3d 775 (9th Cir. 1993), aff'g 788 F. Supp. 445 (S.D. Cal. 1991): A San Diego resident sued the city after it permitted a private group to erect a display consisting of scenes from the New Testament in a public park during December. The district court originally found the display constitutionally permissible private speech in a public forum, but the Ninth Circuit remanded for further fact-finding on the policies governing speech within the park. On remand, the district court again found that the display was private speech, and the Ninth Circuit affirmed.

Ellis v. *City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), aff'g *Murphy* v. *Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991): In three consolidated cases, a Catholic county resident challenged the display of a 36-foot, illuminated Latin cross atop Mt. Helix, on San Diego

County property; two atheist San Diego residents challenged the display of a 43-foot, illuminated Latin cross atop Mt. Soledad, on city property; and an Episcopalian La Mesa resident challenged the inclusion of a Latin cross on the city's seal (which appeared prominently on city vehicles and all official city mailings). The district court held that all four plaintiffs had standing. Rather than addressing the plaintiffs' federal constitutional claims, it evaluated the three crosses under the California Constitution's no-preference clause, and found each one unconstitutional. The Ninth Circuit affirmed both on standing and on the merits.

Americans United for Separation of Church & State v. *City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc), rev'g 784 F. Supp. 412 (W.D. Mich. 1991): Grand Rapids had opened its principal public plaza as a public forum and regularly issued permits for private events and displays. The plaintiffs sued when the city permitted a private group to erect a menorah, accompanied by a sign acknowledging its private sponsor, on the plaza during Hanukkah. The district court enjoined the display in an oral ruling, but the Sixth Circuit reversed.

Harris v. *City of Zion*, 927 F.2d 1401 (7th Cir. 1991), aff'g in part and rev'g in part 729 F. Supp. 1242 (N.D. Ill. 1990): In a pair of consolidated cases, residents challenged their cities' seals. One depicted a leaf, a water tower, industrial buildings, and a church and cross; and the other depicted a Latin cross, a dove, a sword, a crown, and a banner reading, "God Reigns." The district court held only the latter seal

unconstitutional. On appeal, the Seventh Circuit first held that both plaintiffs had standing because they encountered the seals on vehicle tax stickers, garbage bags, a water tower, and elsewhere, and had altered their routes of travel to limit contact with the seals. On the merits, the court held that both seals were unconstitutional.

Murray v. *City of Austin*, 947 F.2d 147 (5th Cir. 1991), aff'g in part and rev'g in part 744 F. Supp. 771 (W.D. Tex. 1990): An Austin resident and taxpayer sought to enjoin use of the city's seal — which included a cross adapted from the family coat-of-arms of Stephen Austin, the city's namesake. The seal appeared on the plaintiff's monthly utility bills, on the uniforms of all city employees with whom the plaintiff interacted, and on and in various public buildings that he visited throughout the city. The district court granted summary judgment to the city. After holding that the plaintiff had standing based on his frequent, personal contacts with the seal, the Fifth Circuit affirmed.

Hewitt v. *Joyner*, 940 F.2d 1561 (9th Cir. 1991), rev'g 705 F. Supp. 1443 (C.D. Cal. 1989): Christian, Jewish, atheist, and agnostic residents of San Bernadino County challenged the county's ownership and maintenance of a donated park decorated with 36 sculptures and tableaux depicting scenes from the life of Jesus. After concluding that the plaintiffs had standing, the district court upheld the displays. The Ninth Circuit agreed that the plaintiffs had standing based on their inability to use the park freely. On the merits, it held that the displays violated the California

Constitution, and thus declined to address the federal Establishment Clause claim.

ACLU of Ky. v. *Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), aff'g 701 F. Supp. 1296 (E.D. Ky. 1988): As part of a holiday display with secular symbols on the State Capitol grounds, Kentucky constructed a rustic stable in which private groups were permitted to perform live nativity pageants. The district court found that the plaintiffs had taxpayer standing that the State could cure any constitutional violation by posting a disclaimer beside the stable and opening it as a limited public forum for live performances by secular and religious groups. The Sixth Circuit determined that the plaintiffs had standing based on the alternative basis that they suffered impairment of their use and enjoyment of the facility, and affirmed on the merits.

Doe v. *City of Clawson*, 915 F.2d 244 (6th Cir. 1990): An anonymous city resident, whose standing was established in camera, sued to enjoin the display of a crèche among a variety of secular holiday symbols at the entrance to city hall. The Sixth Circuit upheld the display.

Smith v. *County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), aff'g *Smith* v. *Lindstrom*, 699 F. Supp. 549 (W.D. Va. 1988): Several county residents — including six Christian and Unitarian ministers and a Jewish rabbi — challenged a solitary, lighted crèche owned and erected by a private party on the county office building's lawn. Although it found that the lawn was a limited public forum, the district court concluded that the display was unconstitutional. On appeal, the Fourth Circuit confirmed that the plaintiffs had

standing based on their allegations of noneconomic injury, and it also affirmed the district court's ruling on the merits.

Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), rev'g 655 F. Supp. 844 (D. Utah 1987): St. George citizens, including several ministers, challenged both the depiction of a Mormon temple on the city logo and the city's provision of free electricity to illuminate the local temple's exterior. The district court held that the plaintiffs lacked standing to challenge the electricity subsidy, and it upheld the logo on the merits. The Tenth Circuit held, however, that the plaintiffs had standing to challenge the electricity subsidy, and that the subsidy to a religious institution was impermissible. It further held that the plaintiffs' direct personal contact with the logo, which appeared on city vehicles and at city hall, conferred standing to challenge it, but remanded for further fact-finding on the merits of that claim.

Doe v. *City of Warren*, Nos. 88-2187, 89-1078, 1989 WL 137851 (6th Cir. Nov. 16, 1989): In two consolidated cases, the plaintiffs sought to enjoin their cities' holiday displays. Warren's display, on the front lawn of city hall, included a crèche and menorah among various secular symbols and figures. Westland's display, spread over a considerable distance in a large public square, consisted of a crèche and many secular items. Both the district court and court of appeals upheld both displays.

Kaplan v. *City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), rev'g 700 F. Supp. 1315 (D. Vt. 1988): A rabbi, a Unitarian minister, and a lawyer challenged their

city's issuance of a permit to a private group to erect a menorah in City Hall Park, where they each encountered it in the course of their daily activities and suffered consequent mental anguish. The district court upheld the display, but the court of appeals reversed and struck it down.

Mather v. *Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989), rev'g 699 F. Supp. 1300 (N.D. Ill. 1988): A Jewish resident sued to enjoin the display of a crèche, accompanied by a disclaimer and numerous secular holiday symbols, on the village hall's lawn. The district court found the display unconstitutional, but the Seventh Circuit reversed, concluding that Mundelein's display was virtually indistinguishable from that upheld in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

American Jewish Congress v. *City of Chicago*, 827 F.2d 120 (7th Cir. 1987), rev'g No. 85-C-9471, 1986 WL 20750 (N.D. Ill. Nov. 5, 1986): Four Chicago citizens, two Jewish and two Catholic, challenged the display of a privately-owned crèche alongside a Santa Clause, reindeer, wreaths, and Christmas lights in the lobby of City Hall. The district court held that the plaintiffs had standing but found no constitutional violation. The Seventh Circuit reversed on the merits and struck down the crèche.

ACLU v. *City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), aff'g 588 F. Supp. 1337 (E.D. Mich. 1984): A Birmingham resident challenged the city's holiday display, which consisted solely of a crèche erected by city employees on the city-hall lawn. The district court held that the display was unconstitutional, and the Sixth Circuit affirmed.

ACLU of Ill. v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), aff'g 622 F. Supp. 1542 (N.D. Ill. 1985): Two residents, a Methodist and a nonbeliever, sought to enjoin their city's display of a 35-by-18-foot, illuminated Latin cross atop the city firehouse. The district court issued a preliminary injunction. Holding that the plaintiffs had standing because they alleged they had altered their routes of travel to avoid exposure to the cross, the Seventh Circuit affirmed on the merits.

Friedman v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc), rev'g *Johnson* v. *Board of County Comm'rs*, 528 F. Supp. 919 (D.N.M. 1981): A non-Christian county resident challenged his county's seal, which bore a blazing Latin cross beneath a Spanish translation of "With This We Conquer." The seal was affixed to county vehicles, documents, and sheriff's department uniforms. The district court held that the plaintiff had standing but that the seal merely honored the county's cultural heritage. The Tenth Circuit reversed on the merits, concluding the seal was unconstitutional.

ACLU of Ga. v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (en banc), aff'g 510 F. Supp. 886 (N.D. Ga. 1981): Several plaintiffs, including two campers, challenged the display on a mountaintop in a state park of a 35-by-26-foot Latin cross, constructed and maintained by the local chamber of commerce. The cross was visible for several miles, even in an adjacent state; and it flooded two camping areas in the park with light almost bright enough to read by at night. One of the campers, a Unitarian

minister, was subjected to the cross from the porch of his cabin at his church's retreat and conference center in North Carolina. The Eleventh Circuit concluded that the campers had standing because they were forced either to camp elsewhere or to have their right to use the campgrounds conditioned upon exposure to an unwanted religious symbol. The court also concluded that the minister had standing because the cross intruded on his spiritual retreat. On the merits, the court affirmed the district court's ruling that the display was unconstitutional.

Crowley v. *Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980), aff'g 462 F. Supp. 725 (D.D.C. 1978): An individual and two Christian religious groups sued the Smithsonian, contending that its exhibits referring to evolutionary theory unconstitutionally promoted secular humanism. The district court upheld the exhibits, and the D.C. Circuit affirmed.

Hall v. *Bradshaw*, 630 F.2d 1018 (4th Cir. 1980): North Carolina residents and taxpayers challenged the state's inclusion of a "motorist's prayer" on state maps. The Fourth Circuit concluded the prayer was unconstitutional.

Allen v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), rev'g 333 F. Supp. 1088 (D.D.C. 1971), on remand from *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970): An Episcopalian minister, a Catholic priest, a rabbi, and others sued to prevent the federal government from constructing a crèche on the White House Ellipse as part of an annual, multi-symbol holiday display. The D.C. Circuit held that the plaintiffs had standing because the crèche would

interfere with their use and enjoyment of public parkland, but it remanded for further fact-finding on the merits. On remand, the district court upheld the display, but the D.C. Circuit reversed, concluding that the government's sponsorship and administration of the construction of the crèche was unlawful, although the crèche itself was not.

U.S. District Court Cases:

Menes v. *City Univ. of N.Y. Hunter Coll.*, 578 F. Supp. 2d 598 (S.D.N.Y. 2008): A city-college employee challenged his office's custom of permitting employees to display religious items — including angel figurines, a magazine cover featuring the Pope, and Christian-themed holiday posters — in their cubicles and elsewhere in the office. The district court granted summary judgment to the college because the plaintiff produced no evidence that the college or the office manager acted with an improper religious purpose.

ACLU of Fla., Inc. v. *Dixie County*, 570 F. Supp. 2d 1378 (N.D. Fla. 2008): When he visited the Dixie County courthouse to trace the title of a property that he wanted to buy, a prospective county resident encountered a six-ton monument inscribed with the Ten Commandments and "LOVE GOD AND KEEP HIS COMMANDMENTS." The monument sat on the courthouse's front steps. Refusing to buy property in the county while the monument remained, he sued, and the district court held that he had standing because he had altered his course of conduct to avoid the display.

Trunk v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008): In 1993, the Ninth Circuit concluded in *Ellis* v. *City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), that the display of a 43-foot, illuminated Latin cross atop Mt. Soledad on public property violated the California Constitution's no-preference clause. Meanwhile, the private group that had originally erected the cross added myriad other symbols and items to the site; and in 2004, Congress designated it a national war memorial and took the property by eminent domain. A Jewish war veterans' organization and four individual plaintiffs then sued, contending that the cross's display on federal land violated the U.S. Constitution. The district court held that the plaintiffs had standing because the cross's presence interfered with their use and enjoyment of public property, but on the merits, it concluded that the cross's display was constitutionally permissible.

ACLU of Ky. v. *Rowan County*, 513 F. Supp. 2d 889 (E.D. Ky. 2007): Individuals and the ACLU challenged a county's placement of a Ten Commandments plaque among several unrelated plaques on the wall of a courtroom occasionally used for public meetings and voting. After they filed suit, the county replaced the plaque with a display identical to the final display examined by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). The district court held that the plaintiffs had standing based on their past and continuing, direct contact with both the original and modified displays; but it concluded that the modified display was constitutional.

ACLU of Ky. v. *Garrard County*, 517 F. Supp. 2d 925 (E.D. Ky. 2007): County residents challenged a display, on a county-courthouse wall, of the Ten Commandments and religious excerpts from other historical documents. After they filed suit, the county replaced the display with one identical to the final display examined by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). On the county's motion for summary judgment, the district court held that the individual plaintiffs had standing based on their past and continuing, direct contact with both the original and modified displays. The court then denied the motion because material factual issues on the merits remained in dispute.

American Atheists, Inc. v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007): To memorialize state troopers killed in the line of duty, Utah permitted a private organization to erect twelve-foot Latin crosses, each emblazoned with the Utah Highway Patrol logo. Each cross was placed near the site of a particular trooper's death, on state property adjacent to a highway. Three state residents sued, and the district court held that they had standing because they had frequent, direct, and unwelcome contact with the crosses, and would have had to alter their commutes to avoid such contact. On the merits, the court held that the crosses were constitutional.

American Atheists, Inc. v. *City of Starke*, No. 3:05-cv-977-J-16MMH, 2007 WL 842673 (M.D. Fla. Mar. 20, 2007). A Starke resident challenged the display of an illuminated cross, visible from at least a quarter-mile away, atop the city water tower, which

was also emblazoned with the city name and the high-school football team's logo. After holding that the plaintiff had standing because he could not travel in the city without encountering the cross, the district court concluded that the cross display was unconstitutional.

Cooper v. *United States Postal Serv.*, 482 F. Supp. 2d 278 (D. Conn. 2007): A postal customer challenged the display of various religious items in a contract postal unit operated by a church. The customer began using a different, more distant post office — and ultimately sued — after repeatedly encountering a wall display informing customers about Jesus and asking them to submit prayer requests; advertisements and a donation box for a missionary organization; a television monitor playing church-related religious videos; and various other religious items. The district court held that the displays were unconstitutional.

ACLU of Ohio Found., Inc. v. *Board of Comm'rs*, 444 F. Supp. 2d 805 (N.D. Ohio 2006): A lawyer in Lucas County challenged the display of a donated Ten Commandments monument, which was one of fourteen markers and monuments on the county-courthouse grounds. The district court held that he had standing because he encountered the monument in the course of practicing his profession and found the monument and its proximity to the courthouse offensive. On the merits, the court held that the monument was constitutional.

Twombly v. *City of Fargo*, 388 F. Supp. 2d 983 (D.N.D. 2005): Fargo residents challenged a Ten Commandments monument that was donated by a

private party in 1958 to commemorate an urban-renewal project, and was displayed on public land in the heart of the city. No other objects were displayed anywhere nearby; and private parties were not permitted to install permanent displays in that area. The district court held that the monument was constitutional.

Chambers v. *City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005): A Frederick resident who lived within eight blocks of a Ten Commandments monument challenged the city's sale of the monument and land beneath it to a private party, contending that the transaction failed to cure an existing constitutional violation (which had been the subject of an earlier suit that had led to the sale). The district court held that the sale had cured any violation.

Osediacz v. *City of Cranston ex rel. Rossi*, 344 F. Supp. 2d 799 (D.R.I. 2004), rev'd in part on other grounds, 414 F.3d 136 (1st Cir. 2005): A city opened a limited public forum for the display of holiday and seasonal decorations on the front lawn of city hall. When a menorah and crèche were among the first items placed, a city resident brought Establishment and Free Speech Clause claims. The district court ruled for the city on the Establishment Clause Claim, but it held the policy governing the public forum facially unconstitutional because it granted unbridled discretion over speech within the forum to the city's mayor. The First Circuit later reversed in part, concluding the plaintiff lacked standing to assert a free-speech claim because she never desired to erect a display on the lawn.

Staley v. *Harris County*, 332 F. Supp. 2d 1030 (S.D. Tex. 2004), appeal dismissed as moot, 485 F.3d 305 (5th Cir.) (en banc), cert. denied, 128 S. Ct. 647 (2007): A private religious organization donated to Harris County a memorial. The memorial consisted of a Bible, open and inclined toward the courthouse entrance, beneath a glass case atop a stone pedestal. An elected state judge, who had run on a campaign of putting Christianity back into government, used private funds to replace the Bible and encircle it in neon lights and the county then held a rededication ceremony. A lawyer who lived and paid taxes in the county, and who repeatedly encountered the monument in the course of her professional activities, filed suit. The district court concluded that the monument was unconstitutional. A panel of the Fifth Circuit affirmed, but then the en banc court dismissed the county's appeal as moot because the county had removed the monument while renovating the courthouse grounds. Because the county was responsible for mooting its own appeal, the en banc court declined to vacate the district court's decision.

Turner v. *Habersham County*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003): Two county residents, a Baptist minister and an atheist fireman, sued to enjoin the county's displays of the Ten Commandments in the county courthouse and natatorium. The district court held that both plaintiffs had standing based on their direct contacts with the displays, and that the displays were unconstitutional, notwithstanding that the county had added various other documents to each display after being sued.

Jocham v. *Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003): Non-Christian owners of a business located two blocks from the county courthouse challenged a private group's placement of a crèche on the courthouse lawn as part of a holiday display. The district court held that inclusion of the crèche was constitutionally permissible.

ACLU of Tenn. v. *Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002): County residents challenged a display of the Ten Commandments along with other historical documents in the county courthouse. The plaintiffs encountered the displays when they visited the courthouse to obtain and renew licenses, register property, pay local taxes, vote, and transact other business. The district court granted a preliminary injunction, later staying the litigation pending this Court's decision in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). After lifting the stay, the court held that the plaintiffs had standing based on their direct, personal contacts with the display, but declined to enter a permanent injunction on the existing record.

ACLU of Tenn. v. *Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002): Several county residents, including a rabbi and an individual who was engaged in ongoing litigation in county court, sued to enjoin solitary Ten Commandments plaques posted in three county-court buildings. Because the rabbi and the litigant had suffered unwelcome direct contact with displays in two of the buildings while participating in legal proceedings, the district court held that they had standing to challenge only those two displays. On the

merits, the court concluded that the displays were unconstitutional.

Kimbley v. *Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000): A county resident who drove past the courthouse a few times each week, and who frequently visited the genealogy room in its basement, challenged the installation on the courthouse lawn of a donated five-and-a-half ton, limestone monument imprinted with the Ten Commandments, Bill of Rights, and Preamble to the Indiana Constitution. The district court granted a preliminary injunction.

ACLU of Ohio, Inc. v. *City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998): City resident and the ACLU challenged the inclusion of a large Latin cross atop an open book on a city's seal (which also included a factory; a house; and a scroll, quill, and ink bottle). The district court held that the seal was unconstitutional.

Amacio v. *Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998): A Somerset resident challenged a holiday display consisting of a prominent crèche, lights, a wreath, a Christmas tree, and a plastic Santa Claus, on the Town Hall lawn. The district court concluded that the display was unconstitutional.

Harvey v. *Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd mem., 15 F.3d 1097 (11th Cir. 1994): A Jewish lawyer sued to enjoin the solitary display, on an interior wall of a county courthouse, of a panel inscribed with the Ten Commandments and a quote attributed to Jesus. The district court held that the plaintiff had standing based on his regular contacts

with the display, and that the display was unconstitutional.

Doe v. *Small*, 726 F. Supp. 713 (N.D. Ill. 1989), rev'd, 964 F.2d 611 (7th Cir. 1992) (en banc). A city resident sued to enjoin the winter-long display of 16 paintings depicting scenes from the life of Jesus, illuminated at night by streetlights, in a public park that she visited regularly when the paintings were not present. A private party erected the displays but placed them in permanent concrete foundations authorized by the city; in only one year had secular items and a disclaimer been displayed alongside the paintings. The district court enjoined the displays, but the Seventh Circuit concluded that the injunction was overbroad because it reached purely private speech.

ACLU of Cent. Ohio v. *County of Del.*, 726 F. Supp. 184 (S.D. Ohio 1989): Two individuals and the ACLU challenged the county's display of a nativity scene on a courthouse lawn during the winter holidays. The only other display was a small "peace tree" some ninety feet away. The district court held that the display was unconstitutional.

Mendelson v. *City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989): St. Cloud displayed a privately owned, illuminated cross atop its water tower, which was itself emblazoned with the city seal and a welcome message, and was visible throughout the community. A Jewish area resident sued, and the district court concluded that he had standing because he avoided areas of town and businesses lying "in the 'shadow of the cross'" and drove his daughter to school via a circuitous route to avoid viewing the cross. On the

merits, the court held the cross display unconstitutional.

Spacco v. *Bridgewater Sch. Dep't*, 722 F. Supp. 834 (D. Mass. 1989): Christian and Hindu public elementary-school students and their parents challenged the students' assignment to classrooms leased from a Catholic parish, where religious symbols and phrases adorned the building's common spaces and exterior walls, and a priest in robes greeted students as they entered the building. In granting a preliminary injunction requiring that the students be transferred to another school facility, the district court found that the presence of the various religious symbols at a public-school facility constituted a constitutional violation.

Jewish War Veterans of the U.S. v. *United States*, 695 F. Supp. 3 (D.D.C. 1988): A Jewish veterans' organization and one of its members challenged the display of a 65-by-35-foot, illuminated Latin cross, constructed with public resources, on a U.S. Marine Corps base. The district court held that the plaintiffs had standing because the individual avoided using services available on the base and had altered his routes of travel to avoid contact with the cross. On the merits, the court concluded that the display was unconstitutional.

Aitken v. *United States*, No. 86-0533, 1987 WL 49142 (D. Haw. Jan. 16, 1987): Plaintiffs of various faiths challenged the display of a 65-by-35-foot, illuminated Latin cross, constructed with public resources, on a U.S. Marine Corps base. The district court held that only one, a Jewish area resident who avoided traveling

on a highway from which the cross was visible, had standing. The plaintiffs later voluntarily dismissed the suit.

ACLU of Miss. v. *Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987): Each December, lights in a twenty-story state office building in downtown Jackson were left on or turned off, and curtains were drawn, to create an illuminated Latin cross that spanned the entire building. The cross could easily be seen from miles away, including from the major north-south arteries of the city. Several Jackson residents, including two from whose homes the cross was visible, sought a preliminary injunction. Because the illuminated cross affected the residents' use and enjoyment of a vast swath of the city — including, for two of them, their own homes — the court held that they had standing; and it issued a preliminary injunction.

Libin v. *Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985): Where a volunteer fire department's holiday display consisted of an illuminated cross, three wreaths, and a few strings of lights, citizens sought a preliminary injunction prohibiting the cross's display on the town-owned firehouse. The district court granted the preliminary injunction.

Greater Houston Chapter of the ACLU v. *Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), appeal dismissed, 755 F.2d 426 (5th Cir. 1985): A county commissioner installed a row of three, free-standing Latin crosses, with the center cross taller than the others, and later a Star of David, at a designated meditation site adjacent to a zoo in a public park. Two anonymous residents initially

challenged the display; but when the court required them to reveal their identities, they were replaced by several other, named residents. These included a Jewish woman who lived near the park, who encountered the symbols when visiting the zoo with her daughters, and who testified that she felt terrified and threatened by the symbols' presence. The court concluded that the display was unconstitutional.

Birdine v. *Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983): After discovering a desecrated cemetery on property condemned for highway construction, the Georgia Department of Transportation planned to preserve the graves and to install a statue of Jesus and several Latin crosses to recreate a graveyard feel. Several individuals who lived nearby, including some non-Christians, sued to enjoin the planned monuments. The district court held that they had standing because they would frequently encounter the monuments in the ordinary course of their routine activities. The court also concluded that the planned Jesus statue would be unconstitutional, but that because the State had changed its plan to permit surviving relatives of identified decedents to select appropriate burial markers for installation on the site, rather than simply using crosses for everyone, the plaintiffs' other claims were moot.

Ring v. *Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980): Several parents and their minor children sought to enjoin the implementation of a statute requiring the posting of placards bearing the Ten Commandments "of the Christian religion" in all

public-school classrooms in the state. The district court struck down the statute as unconstitutional.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 2009
OFFICE OF THE

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND THE INTERFAITH ALLIANCE IN SUPPORT OF RESPONDENT

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This brief is filed on behalf of the Baptist Joint Committee for Religious Liberty ("BJC") and the Interfaith Alliance in support of Respondent, with the written consent of the parties.[1]

INTERESTS OF THE *AMICI CURIAE*

The BJC is a 73-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to religious liberty for all Americans. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before the Supreme Court.

The Interfaith Alliance is the only national interfaith organization dedicated to protecting the integrity of both religion and democracy in America. The Interfaith Alliance has 185,000 members across the country made up of 75 faith traditions as well as those of no faith tradition. The Interfaith Alliance celebrates religious

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism.[2]

STATEMENT OF FACTS

1. *Case Summary.*[3] In March 2001, Frank Buono filed suit against the federal government, claiming that the National Park Service's ("NPS") maintenance of a Latin cross on federal land located in the Mojave National Preserve (the "Preserve") violated the Establishment Clause. J.A. 1. A prior version of the cross purportedly had been erected by the Veterans of Foreign Wars ("VFW") as part of a World War I memorial. J.A. 53. Currently, however, the cross stands alone, with no indication that it is meant to signify anything other than a symbol of Christianity. *Id.* Mr. Buono sought a declaratory judgment that the cross violated the Establishment Clause and a permanent injunction compelling defendants to remove the cross. J.A. 59. In 2004, the court of appeals affirmed a district court final judgment holding that Mr. Buono had standing to bring an Establishment Clause challenge to the presence of

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2. Although the interests of *amici* arise in many Establishment Clause and Free Exercise Clause contexts, *amici* here file this brief in support of Respondent's standing arguments.

3. *Amici* refer to and incorporate by reference Respondent's Counterstatement of the Case. Brief of Respondent Frank Buono at 1-8, *Salazar v. Buono*, No. 08-472 (July 27, 2009).

the cross on federal land and that the government's maintenance of a Latin cross violates the Establishment Clause. The court of appeals also affirmed the district court's order permanently enjoining Petitioners from maintaining the cross on federal land ("*Buono I*"). The government sought neither en banc review of the court of appeals' decision nor review of that decision in this Court.

In 2005, Respondent brought an action to enforce the judgment in *Buono I* ("*Buono II*"). In the latter proceeding, Petitioners argued that Congress had remedied the constitutional violation adjudicated in *Buono I* by passing a law authorizing the transfer of the land on which the cross sits to a private party. The court of appeals in *Buono II* rejected Petitioners' argument, held that the land transfer statute did not adequately remedy the constitutional violation, and enjoined the transfer.

2. *Mr. Buono's Direct Injuries.* Mr. Buono's standing stems from direct injuries to his aesthetic and environmental interests. Mr. Buono was a steward of the Preserve, where the cross is located, for many years both during and after his 25-year employment with the NPS. J.A. 61-63. This employment included serving as the assistant superintendent of the Preserve from November 1994 to December 1995. J.A. 61-62. Mr. Buono now visits the Preserve "two to four times a year on average," and intends "to continue to visit the Preserve on a regular basis." J.A. 64. Because of these facts, the Preserve has "special significance" for Mr. Buono. *Id.*

Mr. Buono stated that he would visit the Preserve even more frequently once he moved from Oregon to southern California or Arizona, which he planned to do shortly after filing the complaint. *Id.* Mr. Buono stated that "[t]he presence of the cross on federally owned land in the Preserve deeply offends [him] and impairs [his] enjoyment of the Preserve." J.A. 64-65. Specifically, although Mr. Buono is Catholic, he is greatly troubled by observing the cross on federal land while knowing that other religious groups are not allowed to erect any religious signs or symbols on the same land. J.A. 64.

Significantly, Mr. Buono alleged that the presence of the cross has caused him to alter his activities: "[Mr.] Buono [has and] will [in the future] tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." Pet. App. 107a, 123a; *see also* J.A. 65. Cima Road is often Mr. Buono's preferred road into the Preserve for a number of reasons besides convenience. First, Cima Road runs through the world-class Joshua Tree forest. J.A. 74. Mr. Buono enjoys the scenery of the Joshua Tree forest, especially when the trees are in bloom; indeed, the NPS touts the forest in its visitor brochure as one of the Preserve's featured attractions. *Id.* Second, Mr. Buono sometimes takes Cima Road to visit abandoned mines and mining equipment just off that road, because he finds such mines and equipment fascinating. J.A. 74-75. Finally, the trail head of the Teutonia Peak hiking trail, one of only two constructed hiking trails on the Preserve, is situated on the land where the cross is located. J.A. 92. Thus, if Mr. Buono

avoids Cima Road because of the cross, he deprives himself of one of the few access points to, in his words, a land of "spectacular beauty." *Id.*

SUMMARY OF THE ARGUMENT

The government asserts several challenges to Mr. Buono's standing in this case. First, the government suggests – without authority – that Mr. Buono lacks standing to challenge the government's purported remedy to his injury. Second, the government tries to re-litigate whether Mr. Buono ever had standing to obtain the injunction in the first place. Both of the government's arguments are unavailing. As an initial matter, a party obtaining the injunction has the right to have it enforced, and the courts have both the power and the duty to insure that the injunction is not disregarded. Consequently, Mr. Buono has the right to challenge a purported cure of the underlying Establishment Clause violation which was enjoined in *Buono I*. Second, Respondent's Article III standing has been fully and finally decided in *Buono I*, and, thus, is *res judicata* in the case at bar. Third, even if this Court entertains the government's challenge to Mr. Buono's Article III standing, Mr. Buono has standing to assert an Establishment Clause violation.

This Court interprets Establishment Clause standing in much the same way as any other Article III standing case: a person must allege a redressable injury in fact that was caused by the challenged government conduct. The injury can be economic or non-economic, but must amount to more than a mere ideological injury. A person must be directly affected by the allegedly unconstitutional conduct.

The injury itself can take many forms such as economic injury and aesthetic injury, including the profanation of a person's religion. The Latin cross is an established religious symbol, and the placement of a religious symbol at a place designated as a memorial to the dead conveys a religious message. To deny that such placement is primarily a religious decision with a primary effect of advancing religion degrades the meaning and purpose of the religious symbol, causing an injury to those who hold that symbol to be an integral part of their religious beliefs.

Injury also stems from the need to avoid the challenged government conduct. Avoiding the religious symbol causes both aesthetic and recreational injury to an individual – all sufficient to establish Establishment Clause standing.

ARGUMENT

I. RESPONDENT HAS STANDING TO ENFORCE THE INJUNCTION

As an initial matter, the government suggests that Mr. Buono does not have standing to enforce the district court's injunction because he "lacks standing under the Establishment Clause to challenge Congress's land transfer." Pet. Br. 9. The government cites no authority for this proposition, because there is none.

Federal courts have inherent power and authority to enforce a judgment and punish a party for disobeying the courts' orders. 18 U.S.C. § 401(3). "When a court employs 'the extraordinary remedy of injunction,' it

directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The parties are bound to obey an injunction and are under an obligation to take steps to insure that violations of the order do not occur. *See GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980); *Union Tool Co. v. Wilson*, 259 U.S. 107 113-14 (1922).

Moreover, the party obtaining the injunction has the right to have it enforced. Fed. R. Civ. P. 70; *Buckeye Coal & Ry. v. Hocking Valley Ry.*, 269 U.S. 42, 49 (1925); *People by Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 71-72 (2d Cir. 1996); *cf. United States v. Amoco Chem. Co.*, 212 F.3d 274, 275 n.2 (5th Cir.2000) ("a consent decree is enforceable by those who are parties to it."). As the Seventh Circuit has observed, "[n]o one wants an injunction that cannot be enforced. . . . An injunction is supposed to be a swift and effective remedy, summarily enforceable through contempt or other supplementary proceedings in the court that issued the injunction." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir. 1985).

Here, the government is attempting, by way of a land transfer, to craft a remedy to the underlying Establishment Clause violation, and thereby moot the district court's injunction. But Mr. Buono has a vested right in the government's *compliance* with the injunction, not avoidance of it, since the injunction was issued to address his specific injury. Consequently, the government's claim that Mr. Buono does not have standing to challenge the land transfer is unsupportable.

II. THE GOVERNMENT IS BARRED FROM RE-LITIGATING MR. BUONO'S STANDING TO OBTAIN THE INJUNCTION

The government also attempts to re-litigate whether Mr. Buono had standing to assert a claim under the Establishment Clause, the predicate finding for issuing the injunction. Pet. Br. 13-20. But Mr. Buono's standing was addressed and finally determined during the course of litigation ending with *Buono I*. As the district court held and the Ninth Circuit affirmed:

> There is no question based on the uncontroverted facts that [Buono was] harmed by being subjected to an unwelcome religious display, namely the cross. . . . Plaintiff came into a direct and unwelcome contact with the cross. [He] was offended by its presence, and [he] will continue to be offended by its presence on subsequent, imminent trips by [him] to or near the site of the cross.

Pet. App. 131a; *see also* Pet. App. 107a.

The government did not appeal that decision, and instead choose to reassert its standing challenge in *Buono II*, the action to enforce the underlying injunction. However, "[t]he general rule is that even though a judgment of contempt and an underlying injunction whose violation is the basis of the contempt finding are related . . . each is a separate judgment and each must be appealed within the time limits prescribed by the rules." *Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 608 (6th Cir. 1991). Appeal

deadlines, of course, are "mandatory and jurisdictional." *Mo. v. Jenkins*, 495 U.S. 33, 45 (1990).

Where a court's determination of a person's standing becomes final, such that no appeal may be taken from that decision, no party may re-litigate whether that person has standing in this Court or any other. *See, e.g.*, *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) ("After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact."); *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations — both subject matter and personal."); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377-78 (1940); *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (discussing *Chicot County*).

In 1931, this Court articulated this principle in *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). In that case, the Court held that a party who had unsuccessfully contested and litigated the court's personal jurisdiction could not later collaterally

attack the original court's judgment in another court. *Id.* at 226-37. The Court stated:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

Id. at 525-26.

Recently, the Court reaffirmed this long-standing principle in *Travelers Indemnity Company v. Bailey*, 129 S. Ct. 2195 (2009). In that case, this Court held that *res judicata* bars collateral attack on jurisdictional determinations. *Id.* at 2206. The Court reasoned: "If the law were otherwise, and courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of *res judicata* would be entirely short-circuited." *Id.* (internal citations omitted).

The government here attempts to cloak its challenge to Respondent's Establishment Clause standing in the garb of a new and separate challenge to the standing to enforce the injunction in light of the land transfer. Given that it propounds the same arguments in this appeal that it asserted in its arguments against Respondent's

standing initially, such a characterization of the standing issue as new and different falls flat. But even if the government is not precluded from arguing standing, Mr. Buono's Article III standing is beyond dispute.

III. BUONO HAS INJURIES SUFFICIENT TO SUPPORT STANDING

It is well established that Article III standing is not confined to plaintiffs who demonstrate an economic injury. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (standing under the Establishment Clause may be supported on noneconomic injury). By their very nature, Establishment Clause injuries tend to be non-economic in nature. *See, e.g., id.*; *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851-52, 858 (2005) (finding an Establishment Clause violation when petitioners posted a version of the Ten Commandments in a heavily trafficked area of their courthouses); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (finding an Establishment Clause violation when high school students were compelled to take part in a religious benediction at graduation ceremonies).

A. Legal Standard

Under Article III of the United States Constitution, a plaintiff in a federal case must show: 1) concrete and actual injury; 2) a causal connection between the injury and the challenged conduct; and 3) a redressable injury. *Vt. Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 771 (2000). In Establishment Clause cases, concrete and actual injury occurs when

the plaintiff shows that he has been directly affected by the government's establishment of religion. *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 225 n.9 (1963).

In *Schempp*, the plaintiffs were a family whose children attended public school in Pennsylvania. *Id.* at 205-06. At the time, Pennsylvania law mandated that at least ten verses of the Bible be read aloud at the beginning of each school day. *Id.* at 205. Plaintiffs, who were members of the Unitarian Church, claimed that such readings ran contrary to their religious beliefs. *Id.* at 206. The Court held that the plaintiffs had standing to bring suit, stating, "[t]he parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." *Id.* at 225 n.9.

Conversely, in *Valley Forge*, 454 U.S. at 468, the federal government conveyed a plot of land to the Valley Forge Christian College, a nonprofit educational institution in Pennsylvania. Americans United for Separation of Church and State, Inc. ("Americans United"), along with members living in Maryland and Washington, D.C., sued under the Establishment Clause, claiming that the conveyance violated their right as taxpayers, because their tax dollars were being used to violate the First Amendment. *Id.* at 469, 487. In this case, the Court held that the plaintiffs did not have standing because, despite their obvious and genuine fervor for their cause, none of them had suffered any direct injury as a consequence of the conveyance. *Id.* at 485-86. The Court noted that the plaintiff

organization had failed to make specific allegations of injury to any of its members living in Pennsylvania. *Id.* at 487 n.23. *Valley Forge*, however, emphasized the rule of *Schempp* that taking offense at state-sponsored religious practices and being "forced to assume special burdens to avoid them" was the kind of noneconomic injury that confers Article III standing. *Id.* at 486 n. 22.

This express emphasis by the Court on the kind of direct, non-economic injury that conveys standing only supports Mr. Buono's standing here. Mr. Buono alleges a sufficiently direct injury from government action that fits well within the tests for standing as articulated by this Court.

B. A Person Has Standing To Sue Under The Establishment Clause If He Is Directly Affected By Unwelcome Government Establishment Of Religion

Mr. Buono differs from the Maryland and Virginia citizens in *Valley Forge*, who were not directly affected by the government's alleged conduct in Pennsylvania. Here, Mr. Buono alleged that he was directly injured in his enjoyment of the Preserve by the government's violation of the Establishment Clause. Moreover, the government's suggestion that Article III standing requires that a person object to the religious message itself, in some entirely different context, is unfounded in law or logic.

1. Aesthetic and recreational injury is sufficient to establish a concrete and personalized injury

The "injury in fact" requirement may be satisfied by harm to aesthetic, recreational, and environmental interests. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (reasoning that such interests "are important ingredients of the quality of life in our society" that warrant judicial protection); *accord United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-87 (1973) (finding harm to "aesthetic and environmental well-being" sufficient for standing). Generally, to gain standing based on a non-economic injury, a plaintiff is required to establish that he or she has been "directly affected by the laws and practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 486, n.22 (quoting *Schempp*, 374 U.S. at 225 n.9). Where such a particularized and direct harm is shown, standing is appropriate. *See Van Orden v. Perry*, 545 U.S. 677, 682-84 (2005) (not questioning standing of plaintiff to bring Establishment Clause claim when he brought suit six years after having last walked by a monument including the Ten Commandments on state property); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691-93 (11th Cir. 1987) (standing established because plaintiffs were directly confronted by the word "Christianity" on city seal).

Here, Mr. Buono has alleged facts sufficient to support standing based on direct injuries to his aesthetic and environmental interests. In particular, Mr. Buono was a steward of the Preserve for many years and he now visits the Preserve "two to four times a year

on average," and intends "to continue to visit the Preserve on a regular basis." J.A. 64. Mr. Buono has stated that "[t]he presence of the cross on federally owned land in the Preserve deeply offends [him] and impairs [his] enjoyment of the Preserve." J.A. 64-65. Mr. Buono has also alleged that the presence of the cross has caused him to alter his activities: "[Mr.] Buono [has and] will [in the future] tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." Pet. App. 107a, 123a.

Contrary to the government's arguments, such noneconomic injuries are no less personal, and they do not transform Respondent into a mere bystander. As noted earlier, Establishment Clause injuries are uniquely non-physical and rarely economic. Mr. Buono's injury here is sufficiently direct and consistent with other non-economic injury cases like *McCreary County v. ACLU*, *supra*, where plaintiffs objected to the display of the Ten Commandments in a public courthouse. 545 U.S. at 851-52. Furthermore, Mr. Buono has shown more concrete injury here than required under cases like *Van Orden v. Perry*, where the plaintiff had not witnessed the monument in question for six years before filing suit. 545 U.S. at 682. In both *McCreary* and *Van Orden*, the plaintiffs had standing.

ACLU of Illinois v. City of St. Charles, 794 F.2d 265, 267 (7th Cir. 1986), is particularly persuasive. There, defendant city ("St. Charles") had a longstanding tradition of erecting a six-acre Christmas display that included a large Latin cross, reindeer, Santa Claus, and

other items. St. Charles would light the cross, making it an "unmistakable symbol of Christianity." *Id.* The two plaintiffs were residents of St. Charles who objected to the cross because, in their view, the display of the cross violated the separation of church and state. *Id.* One of the plaintiffs was a Methodist, while the other was a "nonbeliever" who was "raised as a Christian." *Id.* Both plaintiffs alleged that they "departed from their accustomed routes of travel to avoid seeing [the cross when lit]." *Id.* The district court granted a preliminary injunction prohibiting St. Charles from maintaining the display of the cross, and the Seventh Circuit affirmed. *Id.* at 267, 276.

In addressing plaintiffs' standing, the court found that plaintiffs' alleged detours to avoid the cross were sufficient to support standing. *St. Charles*, 794 F.2d at 268 (finding allegations of detours to avoid the cross analogous to the injury suffered by the plaintiffs in *SCRAP*, 412 U.S. 669, wherein the Supreme Court conferred standing on plaintiffs who argued that defendants' actions curtailed plaintiffs' use and enjoyment of national parks). The Court rejected St. Charles' argument that the harm plaintiffs incurred in detouring from the cross was self-inflicted. *Id.* (relying on *Schempp*, 374 U.S. at 224 n. 9, and *Valley Forge*, 454 U.S. at 486 n.22, to find that a detour was a sufficient injury to support standing).[4]

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4. Notably, the *St. Charles* court dismissed the fact that the cross was maintained by volunteers as irrelevant to the issue of standing, finding that the U.S. Supreme Court had no requirement that Establishment Clause violations be tied to an expenditure of public funds. *St. Charles*, 794 F.2d at 268-69.

Like plaintiffs' claim in *St. Charles*, Mr. Buono's claim concerns a large Latin cross prominently displayed on public property. One of the *St. Charles* plaintiffs objected to the cross despite being Methodist; Mr. Buono objects to the Sunrise Rock cross despite being Catholic.[5] Moreover, like the *St. Charles* plaintiffs, who detoured from their regular routes to avoid the cross, Mr. Buono detours from his preferred route into the Preserve to avoid the Sunrise Rock cross and, in doing so, is deprived of the beauty of the Preserve. Mr. Buono, like the *St. Charles* plaintiffs, has alleged facts sufficient to support his standing to bring his Establishment Clause claim. *See* 794 F.2d at 268-69 (plaintiffs' allegation that they altered normal routes of travel to avoid cross satisfied Article III standing). *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (plaintiffs found to successfully allege injury in fact upon demonstrating that the challenged activity would harm them by lessening the aesthetic and recreational value of the area); *Sierra Club*, 405 U.S. at 734 (destruction of scenery in a national park visited by the plaintiffs "may amount to an injury in fact sufficient to lay the basis for standing").

5. Additionally, the objectionable implication from a cross memorial that only Christians – not those of other religious faiths or those of no religious faith – died for their country, or that only Christians should be commemorated for their service to their country, is injurious.

2. Courts should not consider an individual's religious motives or beliefs in determining standing under the Establishment Clause

Elements of standing, identified and discussed *supra*, do not require or even allow an inquiry into the plaintiff's personal religious beliefs and motivations. The Court's examination of a person's religious motivations or beliefs alone to determine standing raises concerns about government entanglement in religion. It improperly places the Court in the position of evaluating the validity and significance of the beliefs espoused by the party. *See e.g., Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). The suggestion that Mr. Buono's specific religious beliefs (*i.e.*, respect for cross displays on private property) disqualify him from asserting an Establishment Clause challenge to the display of a cross on public land has no place in this Court's standing doctrine.

Historically, courts – including the United States Supreme Court – allow a person's challenge to government endorsement of his religion under the Establishment Clause without examining the person's motivations or personal beliefs. Although the Court has not addressed directly whether a person has standing to object to government endorsement of his or her own religion, the Court has allowed such challenges in the past. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

290, 294 (2000) (Mormon and Catholic plaintiffs objected to Christian prayer at public high school football games); *Weisman*, 505 U.S. 577 (Jewish plaintiffs challenged inclusion of invocations and benedictions including nonsectarian prayer by Jewish rabbi in public school graduation ceremony); *Stone v. Graham*, 449 U.S. 39 (1980) (plaintiffs, including individuals of Christian and Jewish faiths, challenged state statute requiring displays of the Ten Commandments in public schools). *See also Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (Jewish association objected to the presence of a 27-foot menorah in a public park near City Hall during the holiday season); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (Catholic plaintiff objected to the use of public money and public land to display and illuminate Latin cross); *Lamont v. Woods*, 948 F.2d 825, 267 (2d Cir. 1991) (plaintiffs, including a Jewish rabbi, challenged a federal assistance program that provided funding to schools associated with Jewish and Christian religions); *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (plaintiffs, including a Jewish rabbi, objected to the display of a menorah in a public park by City Hall); *St. Charles*, 794 F.2d 265 (Methodist individual objected to display of government-owned Latin cross); *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. 1981) (Christian plaintiff objected to allowing students to conduct morning devotional readings over public address system and teaching elective Bible literature course in a manner which advanced religion); *Allen v. Hickel*, 424 F.2d 944, 945 (D.C. Cir. 1970) (Episcopal

minister and Catholic priest challenged display of nativity scene on federal parkland).[6]

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6. Likewise, numerous federal district courts frequently find that an individual has standing to seek relief from a government endorsement of his or her own religion. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *5 n.11, 7 (D.S.C. Dec. 23, 2008) (holding that plaintiffs, who included a retired United Methodist minister and a Christian pastor, had standing to challenge South Carolina license plates featuring a cross and the words "I believe"); *Turner v. Habersham County*, 290 F. Supp. 2d 1362, 1364, 65 (N.D. Ga. 2003) (holding that ordained Baptist minister had standing to challenge display of Ten Commandments in courthouse); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 968-71 (W.D. Wis. 2003) (holding that plaintiffs, who included a member of the Catholic church, had standing to challenge display of Ten Commandments in city park), *rev'd on other grounds, Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757, 761-62 (E.D. Tenn. 2002) (holding that plaintiffs, who included a Jewish rabbi, had standing to challenge display of Ten Commandments in courthouse); *Adland v. Russ*, 107 F. Supp. 2d 782, 784 (E.D. Ky. 2000) (holding that plaintiffs, who included a Jewish rabbi and Christian ministers, had standing to challenge display of Ten Commandments on state capitol grounds); *Joki v. Bd. of Educ. of Schuylerville*, 745 F. Supp. 823, 824 n.1, 832 (N.D.N.Y. 1990) (holding implicitly that plaintiffs, one of whom "received religious training in a Baptist Church" but had married a Jewish woman and was raising his children in the Jewish religion, had standing to challenge a painting of the crucifixion in public school); *Harvey v. Cobb County*, 811 F. Supp. 669, 671 n.1, 674-75 (N.D. Ga. 1993) (holding that Jewish plaintiff had standing to challenge display of Ten Commandments in county courthouse building); *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (allowing Roman Catholic plaintiffs to challenge school prayer statute), *aff'd*, 780 F.2d 240 (3d Cir. 1985).

As these cases show, the government's contention that Mr. Buono's religious beliefs could defeat his standing in this case runs contrary to a long line of established precedent.

3. Even if courts consider religious motives or beliefs, a person has standing to assert an Establishment Clause claim even where the symbol is one associated with his or her own religion

a. A person can object to government advancement of his religion

The Court has held that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Weisman*, 505 U.S. at 589 (finding the inclusion of a nonsectarian prayer in a public school graduation ceremony violated the Establishment Clause). Where government interferes with that private choice and responsibility, it violates the Establishment Clause. Standing to complain about such government action is not limited to those who object to the religion endorsed by the government. "It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses [the Religion Clauses] exist ***to protect religion*** from government interference." *Id.* (emphasis added). It is the government entanglement with religion that causes

one's injury. Standing to challenge government endorsement cannot be limited to endorsement of another's religion, as profanation of any religion through government advancement of religion violates the Establishment Clause.

A person's injury can stem solely from the degradation of his religion by government endorsement of his religion. Courts throughout the nation recognize that the Establishment Clause does not tolerate profanation of religion. *See e.g., ACLU of N.J. v. Schundler*, 168 F.3d 92, 98-99 (3d Cir. 1999) ("Demystification, desanctification, and deconsecration suggest a process of profanation, something that the Establishment Clause neither demands nor tolerates."). Such profanation of religion is a concrete injury "substantial enough to require attentive examination" by a court. *Allen*, 424 F.2d at 950. The *Allen* plaintiffs, who included an Episcopal minister and a Catholic priest, challenged the government's sponsorship of a pageant in a national park that included the exhibition of a crèche – a religious symbol that depicts the birth of Christ. *Id.* at 945.

In finding standing, the court rejected the argument by the government that plaintiffs could "avoid walking near the [park land] while it was occupied by the crèche. Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional." *Id.* at 947. Regardless of the merits of a plaintiff's contentions, a court has "no basis for denying to a citizen the right to question, through orderly court procedures, alleged

Government sacrilege of the symbols of his religion." *Id.* at n.7.

Just as in those cases, Mr. Buono, a self-identified Roman Catholic, has standing to object to the presence of the Latin cross in the Preserve. A person's religious beliefs are not determinative of the question of whether he may sue for unconstitutional government actions. To suggest that a person only has standing to object to government endorsement of another's religion ignores the injury to one's religious beliefs when government endorsement itself profanes that person's religion.

Mr. Buono no longer enjoys the government property because he sees the government's display of a Christian symbol in a way that misappropriates it and has the primary effect of advancing religion. That is a personal, direct injury, different perhaps from the injury to someone of another faith who feels like an outsider, but injurious nonetheless. Seeing one's faith receive preferential governmental treatment, while aware that no minority faith would receive that treatment, demonstrates the government's perversion of religion for its own ends. The government is taking something that should be a symbol of voluntary religious belief and practice and using it in a way (*i.e.*, maintaining it on government property) that alters its apparent symbolism by making it look like an "official" faith. It is not surprising that devout, voluntary adherents of a religion would not want to send the signal to those who do not share in the religion of the majority that they are political outsiders. Where the government endorses one religion over all others, it weakens the sanctity of that religion and its beliefs. The religious symbol

becomes the official marker of the government, representing a host of individuals who do not subscribe to that religion, rather than keeping the symbol one of an individual or faith community. The symbol and the religion are thereby degraded.

b. Government endorsement of a religion through use of a particular religious symbol detracts from that symbol's religious meaning, causing direct injury to members of that religion

(i) A Latin cross is first and foremost a religious – not secular – symbol

The historical religious significance of placing a cross at a burial site is undeniable. A cross on a grave symbolizes the deceased individual's religious beliefs. In fact, any religious symbol on a grave does the same. A brief examination of the symbols available for engraving by the Department of Veterans' Affairs ("the VA") on veterans' headstones (called "emblems of belief" by the VA) shows that the cross at a gravesite is not the secular symbol that some would like this Court to hold. *See* United States Department of Veterans' Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers, *http://www.cem.va.gov/hm/hmemb.asp* (last visited July 27, 2009). Indeed, the VA itself defines an emblem of belief as "[a]n emblem that represents ***the decedent's sincerely-held belief that constituted a religion or the functional equivalent of a religion*** and was believed and/or accepted as true by the decedent in his or her life. The belief represented by an emblem need not be associated

with or endorsed by a group or organization." United States Department of Veterans' Affairs, Headstone and Marker Application Process Update, *http://www.cem.va.gov/hm/hmqa.asp* (emphasis added) (last visited July 27, 2009). Placement of that symbol on a headstone for use at a gravesite, therefore, connotes a religious belief – not a secular one.

A cross at a war memorial site which commemorates the deaths of soldiers who gave their lives in a particular war is no less religious in meaning. To deny that a Latin cross at a war memorial has a religious meaning not only falls contrary to logic, but also degrades the religious symbolism of the cross. As the use of religious markers at gravesites – placed there according to individual religious beliefs and decisions – commemorates the deceased's religious beliefs, so does a stand-alone religious symbol at a war memorial site. Any effort by the government to make a Latin cross stand as a generic symbol of death illustrates a misuse of that religious symbol. As discussed below, such profanation should not be tolerated.

(ii) Government endorsement of a Latin cross profanes the religious significance of the Latin cross in violation of the Establishment Clause

Given that the Establishment Clause permits neither the promotion nor the infringement of religion, the government may not act in a manner as to actually diminish the long-standing religious impact of a symbol. The Establishment Clause protects the public from

government endorsement of one particular religion in an effort to prohibit the coercive effects of such endorsement. *Engel v. Vitale*, 370 U.S. 421, 430-13 (1962). "Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring). The Clause's purpose does not end there, however, as

> [i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and *to degrade religion*. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.

Engel, 370 U.S. at 431-32 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)) (emphasis added).[7]

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7. Concern about the degradation of religion is hardly novel. As Justice Blackmun stated in dissenting from the Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) (emphasis added):

> The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. . . .

(Cont'd)

Historically, the purpose of the Establishment Clause was to separate religion from the hands of government to prevent injury to dissenters, including Christian dissenters. It was the culmination of British and American political thought grounded not only in John Locke's views on religious toleration and liberty of conscience, but also in Martin Luther's and John Calvin's theology, as mediated by Roger Williams. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 357-67 (2002). Williams was a Baptist minister who, after being expelled from Massachusetts for heterodoxy, founded Rhode Island in 1644 — creating the first experiment in total freedom of conscience on American soil. EDWIN S. GAUSTAD, ROGER WILLIAMS 13, 59, 70 (2005); BAPTISTS AND THE AMERICAN EXPERIENCE 16-17 (James E. Wood Jr. ed., 1976). Williams maintained that for religious belief

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(Cont'd)

> The import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. ***Surely, this is a misuse of a sacred symbol.***

Justice Brennan articulated a similar viewpoint in his dissent in *Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting), where he described one purpose of the Establishment Clause as preventing "the trivialization and degradation of religion by too close an attachment to the organs of government." Government endorsement of a religious symbol does just that – trivializes the symbol and degrades the religion's use of that symbol.

One who worships in a particular faith must be allowed under the Establishment Clause to challenge that degradation.

to be genuine, people must come to it of their own free will, as coerced belief and punishment of dissent are anathema to true faith. Williams also recognized the dangers inherent in government use of religious sacraments. He argued that freedom of conscience flourishes only when churches act without governmental interference; for governmental sponsorship degrades religion's purity and integrity. *See, e.g.*, ROGER WILLIAMS, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963) ("[T]rue religion does not need the support of carnal weapons." (quoted in CONRAD H. MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951)).

James Madison echoed Williams' concerns in 1785, when opposing a bill introduced into the General Assembly of Virginia which provided an assessment for religious teachers. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (available at *http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html* (last visited June 23, 2009)). He argued that the proposed government endorsement would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits." *Id.* Simply put – government endorsement of a religion minimizes its sanctity to both those who follow the religion and those who do not.

When government displays a religious symbol without note or comment, it endorses and supports the religious traditions to which the symbol is sacred. In trying to justify itself by explaining the significance of the religious symbol, government takes sides in any controversies about the meaning and significance of the religious symbol – an endorsement of religion that the Constitution prohibits. Because government can display religious symbols only if it claims a secular purpose and effect, the tendency of its explanations is always to distort and desacralize the religious symbol. The inevitable effect is that government supports only the religion of those who agree with both the sacred meaning of the symbol and the government's secularized explanation of the symbol. Government puts itself in competition with the religion of all other Americans. The Constitution excludes government from such religious competition – for the protection of believers and nonbelievers alike.

The Latin cross has such religious significance. It "is the preeminent symbol of many Christian religions . . . [and] to suggest otherwise would demean this powerful religious symbol." *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (internal citations and quotations omitted). Classifying the Latin cross as secular injures those individuals who hold the cross to be a preeminent symbol of their foundational religious beliefs. As Justice Brennan observed in his concurrence in *Schempp*, 374 U.S. at 259: "[i]t is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into

the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." Courts that view "religious displays through the 'lowest' (secularized) common denominator demean[] the religious nature of the objects displayed . . . ." Frank S. Ravitch, *Religious Objects As Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1061 (Winter 2005). Such diminution of the religious nature of those symbols directly injures adherents of that religious belief.

Establishment Clause cases have recognized the interests inherent in challenging government-sponsored religion under the Establishment Clause, including the interest in protecting religion from government. Such cases demonstrate the error in Petitioner's attempt to strip Mr. Buono's standing on the basis of his religious beliefs.

CONCLUSION

For the reasons argued above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(14)

No. 08-472

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.[1] The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Because religion—like race, ethnicity, art, or music—is a fundamental aspect of human culture, the Becket Fund opposes attempts to use the Establishment Clause to banish acknowledgement of religion from the public square. It has litigated numerous Establishment Clause cases before the Federal Courts of Appeals and this Court. Most recently, The Becket Fund served as special counsel for the States of Colorado, Kansas, New Mexico, and Oklahoma, presenting oral argument in *American Atheists, Inc.* v. *Duncan*, No. 08-4061 (10th Cir. argued Mar. 9, 2009), a Tenth Circuit appeal involving thirteen roadside cross memorials that may be affected by the outcome in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Ninth Circuit's grant of standing—based solely on the fact that Mr. Buono is "deeply offended" by the Mojave Desert cross—demonstrates just how

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

confused the doctrine of standing in Establishment Clause cases has become. Pet. App. 105a-107a.

If Mr. Buono were African-American, and he were "deeply offended" at government action supporting race discrimination—such as government approval of a racially discriminatory club or private school—this Court's cases are unequivocal: Mr. Buono's offended sensibilities, no matter how deep and how justified, would not by themselves constitute a cognizable injury. *Allen* v. *Wright*, 468 U.S. 737 (1984) (racially discriminatory private school); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (racially discriminatory private club). Rather, Mr. Buono would suffer a cognizable injury only if he had been "personally denied equal treatment by the challenged discriminatory conduct"—that is, if he had applied to the club and been rejected, or if he had been personally denied the ability to receive an education in a racially integrated school. *Allen*, 468 U.S. at 755-56.

Turn Mr. Buono into a Roman Catholic, however, and make him "deeply offended" that government property hosts a Latin cross but not a Buddhist stupa, and suddenly his feelings of offense become a cognizable injury. Pet. App. 105a-107a.

If that seems odd, it's because it is. Several leading scholars have noted that courts treat standing under the Establishment Clause as a lower bar than standing in any other area of the law.[2] And as Mi-

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[2] See, *e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499, 521-30 (2002); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. Rev. 1345, 1351-52 (2001); Richard H. Pildes & Richard G. Niemi,

chael McConnell has observed, "[t]here is no evident reason to treat establishment claims with greater solicitude." McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 165 (1992). Indeed, this Court has repeatedly rejected the notion that standing should be a "sliding scale" depending on which constitutional value happens to be at stake. *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

Accordingly, this brief offers a simple principle: standing in Establishment Clause cases should mirror standing in Equal Protection Clause and Free Exercise Clause cases—no more stringent, and no less. That is, a plaintiff's feelings of offense should give rise to a cognizable injury only where the plaintiff has been "personally denied equal treatment" on the basis of religion, *Allen*, 468 U.S. at 755, or where, like a captive audience of public school children, the plaintiff has been unwillingly subjected to government-sponsored religious exercises, *School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

Such a rule is consistent with this Court's decisions in past Establishment Clause cases; it would harmonize the doctrine of standing across areas of constitutional law; and it would further the fundamental purposes of Article III. Under this standard, Mr. Buono lacks standing, and the case should be dismissed.

Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993).

II. Should this Court nevertheless reach the merits, it would once again find that the sporadically-applied "endorsement test" provides no reasoned basis for a decision. The deepest flaw of the endorsement test is its tacit assumption that, to a reasonable observer, every monument conveys only one objective "message." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). But this Court itself has disavowed that assumption in the free speech context, observing that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure" because any given monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1136 (2009).

Such multiple messaging is on full display in this case, as a lone cross in the middle of the desert can reasonably convey several different meanings. The endorsement test offers no principled basis for picking just one of those meanings; thus, it ends up being "nothing more than an application to the Religion Clauses of the principle: 'I know it when I see it.'" McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 148 (1992).

ARGUMENT

I. Standing in Establishment Clause cases should mirror standing in equal protection cases.

This Court's case law under the Equal Protection Clause offers a more coherent model for Establishment Clause standing than the Ninth Circuit's flawed recognition of mere "psychological harm" as a

cognizable Article III injury. Under the Ninth Circuit's misinterpretation of this Court's standing case law, Article III supplies no meaningful limit on Establishment Clause claims: a person who sees a photograph of the Mojave Desert cross in the *New York Times* can suffer just as much, if not more, psychological harm as a person who drives by the cross every day. The doctrine of standing is thus reduced to arbitrary and manipulable limits, such as how often a person sees a monument, or whether they were so offended that they altered their conduct to avoid further offense. Section I.A., *infra*.

By contrast, in an equal protection challenge to race discrimination, psychological harm is not enough to confer standing; rather, standing is available only for "those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (emphasis added); Section I.B., *infra*. This Court already uses a similar approach to standing under the Free Exercise Clause, and the vast majority of this Court's Establishment Clause cases have *implicitly* applied the same approach. Section I.C., *infra*. Making this approach explicit will bring much needed clarity to the question of standing in Establishment Clause cases.

A. Recognizing "psychological harm" as an Article III injury produces arbitrary and inconsistent standing decisions in Establishment Clause cases.

The Ninth Circuit concluded that Mr. Buono has standing because he is "deeply offended by the cross

display" and thus avoids visiting Sunrise Rock.[3] Pet. App. 105a-107a. This Court, however, has never recognized "psychological harm," standing alone, as a basis for standing to sue under the Establishment Clause.

1. The leading case on psychological harm is *Valley Forge*. There, the plaintiffs challenged the transfer of federal property to a religious college. 454 U.S. at 468. The plaintiffs had never visited the property, but filed suit after hearing about the transfer through a news release. *Id.* at 487.

This court concluded that the plaintiffs lacked standing. As the Court explained, "the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III." *Id.* at 485. There must be a "personal injury" beyond mere psychological harm. *Ibid.*

Since *Valley Forge*, lower courts have struggled to draw a line between mere psychological harm, which is not sufficient to confer standing, and concrete personal injuries, which are. The task is made more difficult by this Court's inconsistent Establishment Clause rulings, particularly those relying on the the-

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[3] The Government emphasizes that Mr. Buono is not offended by the cross itself, but by a "policy disagreement[]" about the fact that Sunrise Rock is not open to other private displays. Pet. Br. at 13-14. As explained below, however, it makes no difference whether the source of Mr. Buono's offense is the cross *qua* religious symbol or the cross *qua* limited forum; what matters is that psychological harm, standing alone, is not a cognizable injury. Indeed, asking lower courts to parse the source of the plaintiff's psychological harm will needlessly complicate the standing inquiry.

ory of endorsement. Specifically, if the chief evil of establishment is "endorsement"—which "sends a message to nonadherents that they are outsiders, not full members of the political community"—then lower courts have every reason to think that plaintiffs who suffer psychological harm upon receiving such a message have a cognizable Article III injury. *Lynch*, 465 U.S. at 388 (O'Connor, J., concurring).

At bottom, the endorsement theory is in tension with *Valley Forge*. *Valley Forge* says that psychological harm is not a cognizable injury; but the endorsement theory says that psychological harm is key to an Establishment Clause violation.[4]

In an effort to obey both commands, lower courts typically look to one of four limiting circumstances to distinguish the mere psychological harm at issue in *Valley Forge* from cognizable Article III injuries:

1. *Personal contact*: the plaintiffs must have "direct, personal contact" with the challenged display, which interferes with their "use and enjoyment" of government property;[5]

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[4] See, *e.g.*, Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993) (noting that there is "significant tension * * * between recognition of expressive harms," such as offensive messages under the endorsement test, "and the traditional requirements of individualized wrongs"); see *infra* Section II (discussing flaws of the "endorsement" theory on the merits).

[5] *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985); see also *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987); *Suhre* v. *Haywood County*, 131 F.3d 1083, 1087-88 (4th Cir. 1997).

2. *Frequency*: the plaintiffs must have "frequent" contact with the challenged display;[6]

3. *Residency*: the plaintiffs must reside in the jurisdiction responsible for the challenged display;[7] or

4. *Altered behavior*: the plaintiffs must alter their behavior in response to the challenged display.[8]

As explained below, all of these circumstances are simply window dressing on the same "injury" claimed in *Valley Forge*, namely, psychological offense at the government's conduct. It is therefore no surprise that these "limiting" circumstances turn out to be easily manipulable, transforming the standing inquiry into nothing more than an invitation to artful pleading.

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[6] See, *e.g.*, *Vasquez* v. *L.A. County*, 487 F.3d 1246, 1252 (9th Cir. 2007) (plaintiff's contact with the offensive symbol "was frequent and regular, not sporadic and remote"); *Foremaster*, 882 F.2d at 1491 (plaintiff "has frequent and close connection with [the city][,] * * * [and] is directly confronted by the logo on a daily basis").

[7] See, *e.g.*, *Washegesic* v. *Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."); *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) ("Maybe it ought to make a difference if a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere.").

[8] See, *e.g.*, *St. Charles*, 794 F.2d at 268 (plaintiffs "have been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use"); *Glassroth* v. *Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (plaintiff "has incurred expenses in order to minimize contact with the monument").

2. One of the most common limitations—adopted in the Fourth, Sixth, Tenth, and Eleventh Circuits—is that the plaintiff must have "direct, personal contact" with the offensive monument. See n.5 *supra*. These courts often analogize to standing based on environmental harm, saying that personal contact with offensive government conduct "impairs [the plaintiff's] actual use and enjoyment of [government] property."[9] For example, merely seeing a picture of the Mojave Desert cross in the *New York Times* is not enough; but if the plaintiff visits the Mojave Desert and sees the cross in person, he has suffered a cognizable injury.

But there is no difference in kind, and often no difference in degree, between the harm suffered when seeing a picture of an offensive monument in a newspaper (or hearing about it in a news release) and seeing the same monument in person. As Judge Posner has explained, the fact that individuals are "deeply offended" when they see a government display in person "is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays." *St. Charles*, 794 F.2d at 268. Rather, one who sees the cross in person experiences the same type of harm (psychological offense and feelings of exclusion) as the one who sees only a picture. See also *ACLU-NJ* v. *Township of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (Alito, J.) (not-

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[9] *Hawley*, 773 F.2d at 739-40 (citing *United States* v. *SCRAP*, 412 U.S. 669 (1973)); see also *Gonzales* v. *North Township of Lake County*, 4 F.3d 1412, 1417 (7th Cir. 1993) ("Like the *SCRAP* plaintiffs, the plaintiffs here are users of Wicker Park, and their full use and enjoyment of the Park has been curtailed because of the defendants' display of the crucifix.").

ing that feelings of "resentment" upon seeing a religious display in person are, at least arguably, "tantamount to the 'psychological consequence[s]'" that were "insufficient to establish standing" in *Valley Forge*).

Nor is it any help to re-characterize the harm (with a nod to environmental cases like *SCRAP*) as interference with the plaintiff's "use and enjoyment" of government property. *Hawley*, 773 F.2d at 740 (citing *SCRAP*). Physical harm to public lands produces a concrete, external interference with the plaintiff's ability to use and enjoy public land (*e.g.*, fishing is fruitless because fish have been killed by pollution; hiking in pristine wilderness is impossible because trails are strewn with litter). By contrast, in the case of a religious display, there is no external, *physical* change in the plaintiff's ability to use and enjoy public lands. The only change is in the internal, *psychological* experience of the offended visitor.[10]

Indeed, taken to its logical conclusion, treating psychological harm like physical harm to public lands (religious pollution, if you will) creates just the sort of "special license to roam the country in search of governmental wrongdoing" that the Court condemned in *Valley Forge*. 454 U.S. at 487. A perfect example is the Eleventh Circuit's ruling in *American Civil Liberties Union of Georgia* v. *Rabun County*

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[10] Moreover, "use and enjoyment," as used in *SCRAP* and *Lujan*, is a term of art, referring not to mere psychological pleasure at visiting public lands, but to a concrete legal interest—a usufructuary right—in public lands. See *Black's Law Dictionary* 1580 (8th ed. 2004) (defining "usufruct" as "[a] right to use and enjoy the fruits of another's property").

Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983). There, the plaintiffs challenged an illuminated cross located in a Georgia state park. None of the plaintiffs had ever been to the park or seen the cross in person (except one plaintiff who saw it from an airplane); instead, they heard about the cross through "anonymous phone calls and news releases." *Id.* at 1107.

Nevertheless, drawing on *SCRAP* and other cases of environmental injury, the court found standing. Two of the plaintiffs liked to camp in state parks, but they were unwilling to camp in a park with an illuminated cross. Under *SCRAP*, this was enough to establish interference with the use and enjoyment of public land: "we can conceive of no rational basis for requiring the plaintiffs to *view [the cross] in person* * * * [because] [e]ach plaintiff found his option to use the Georgia state public parklands restricted, *upon learning of the cross*." *Id.* at 1107 n.17 (emphasis added). Such a broad conception of injury serves none of the purposes underlying Article III.

3. Frequency and residency add nothing of substance to the standing analysis, either.[11] As for frequency, if a plaintiff is not injured by seeing an offensive display for the first time, there is no reason to think he will be injured by seeing the same display for the second, or sixtieth, time. Frequency gets at the magnitude of the injury, not the nature of the injury.

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[11] See, *e.g.*, *Vasquez*, 487 F.3d at 1251-52 (mentioning frequency and residency, but relying principally on "unwelcome direct contact"); *Hawley*, 773 F.2d at 740 (same).

As for residency, arguably, one who resides in the jurisdiction responsible for a religious display might feel "intensely distressed," or even threatened, if the government erects an offensive display, *St. Charles*, 794 F.2d at 268, while a transient visitor need not fear what the government might do when he departs. But even for a resident, the feelings of exclusion and threat are just that—feelings (psychological harm). They are not, standing alone, the stuff of Article III injury. As Judge Posner put it, a residency requirement simply gets at "degrees of distress"; it does not separate one type of injury from another. *Ibid.*[12]

4. The final candidate for a rational limiting principle is that plaintiffs must alter their behavior in response to the offensive display. Under this principle, the plaintiff who is offended at seeing the Mojave Desert cross on his regular visits does *not* have standing; but the plaintiff who avoids the cross by taking an inconvenient detour does.

This rule raises an obvious question, which has no good answer: "If offense is not enough, why is a detour attributable to that offense enough?" *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting).

Proponents of the detour approach say that it serves three purposes. First, "the willingness of plaintiffs * * * to incur a tangible if small cost *serves*

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[12] Like other limitations, residency is also manipulable. See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) (when the Society of Separationists could find no residents who objected to the city's seal, the plaintiff "moved to a boarding house within the city's limits and lent his name to the litigation").

to validate, at least to some extent, *the existence of genuine distress and indignation*, and to distinguish the plaintiffs from other objectors to the alleged establishment of religion." *St. Charles*, 794 F.2d at 268 (Posner, J.) (emphasis added). In other words, a court cannot believe a plaintiff's allegation of psychological harm unless he proves his sincerity by altering his behavior in some inconvenient fashion. But if psychological harm cannot, by itself, create standing, "new and better ways to prove its existence cannot create standing" either. *Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting).

Second, proponents say that allowing the court to find standing on the basis of a detour ensures that "there will be [a] judicial remedy against establishments of religion that do not depend on public funds." *St. Charles*, 794 F.2d at 268 (Posner, J.). But this Court has long rejected the notion that the doctrine of standing should be stretched to ensure that there is an available plaintiff: "The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Third, requiring a detour to establish standing "narrows the class of plaintiffs and scope of dispute." *Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting). True; but so would limiting standing to redheads, or to cases of financial harm. Just because a rule cuts back on the number of plaintiffs who have standing does not mean that it is a *principled* rule. To be principled, it must do the work of separating concrete injury from intangible harm. A detour limi-

tation does not do so; it simply permits standing in some cases of psychological harm, but not others.

Not only is the detour approach unhelpful in separating concrete injuries from intangible harm, but it also creates serious traceability problems. As this Court has repeatedly explained, "self-inflicted" injuries—injuries attributable not to the defendant's conduct but to the plaintiff's "personal choice" in response—do not create standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976); *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003). Thus, while the psychological harm of seeing an offensive display may be traceable to the government, the plaintiff's decision to take a detour is not—and that decision cannot serve as a basis for standing.

* * * * *

Personal contact, frequency, residency, and altered behavior are all simply artificial means of dressing up what is, at bottom, the "psychological consequence" of observing conduct with which one disagrees. *Valley Forge*, 454 U.S. at 485. As such, they are an insufficient basis for a coherent jurisprudence of Article III standing.

B. Standing in Establishment Clause cases, like standing in equal protection cases, should be based on the objective legal effects of the government's conduct.

This Court should look to its equal protection cases as a model for Establishment Clause standing. When assessing standing under the Equal Protection Clause, this Court has long held that mere psychological harm—such as the stigma resulting from racially discriminatory laws—is insufficient, by itself,

to confer standing. Rather, stigma confers standing only for "those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (emphasis added; internal quotations omitted).

This rule, which focuses on the "legal treatment" of the plaintiffs, has provided lower courts with clear guidance for assessing standing in equal protection challenges. Applying a similar rule in the Establishment Clause context would not only provide similar clarity, but would faithfully advance the principles underlying Article III.

1. The leading case on equal protection standing is *Allen*. There, the parents of African-American public school children sued the Internal Revenue Service (IRS), claiming that the IRS had violated its obligation to deny tax-exempt status to racially discriminatory private schools. According to the parents, as a result of the IRS's discriminatory practices, they and their children suffered "stigmatic injury, or denigration," on the basis of their race. *Id.* at 754. (This injury is analogous to the injury alleged in many Establishment Clause cases, where plaintiffs complain of being stigmatized as "outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).)

In a 5-3 opinion written by Justice O'Connor, this Court denied standing because the plaintiffs did not allege that they had been "*personally denied equal treatment*" by the IRS. *Allen*, 468 U.S. at 755 (emphasis added). As the court explained, "[t]here can be no doubt that [the stigmatizing injury often caused by racial discrimination] is one of the most serious

consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are *personally denied equal treatment*' by the challenged discriminatory conduct." *Ibid.* (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984)) (emphasis added).

Under this rule, plaintiffs do *not* have standing to challenge a racially discriminatory membership policy at a club merely because the policy makes them feel like stigmatized outsiders; they have standing only if they "applied for membership" and were denied. *Ibid.* (citing *Moose Lodge*, 407 U.S. at 166-67). Similarly, plaintiffs do not have standing to challenge race discrimination in the criminal justice system merely because it makes them feel like outsiders; they have standing only if "they ha[ve] been or would likely be *subject to the challenged practices*." *Ibid.* (citing *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)) (emphasis added).

Otherwise, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating * * * . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.* at 755-56 (internal quotations and citations omitted) (citing *Valley Forge*, 454 U.S. at 489-90 n.26). Much like the lower courts' jurisprudence in Establishment Clause cases, such a rule would "transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 756.

Allen's "legal treatment" rule has provided consistent, easily administrable guidance in the vast majority of equal protection cases. For example, when a plaintiff's vote is diluted[13] or disparately weighted[14] because of race, the plaintiff has standing. So, too, when a plaintiff is denied a government benefit because of gender,[15] or is denied the ability to compete for a government benefit on equal footing because of race.[16] In all of these cases, it is easy to determine that the plaintiff has not merely suffered stigmatic harm, but has been "personally denied equal treatment" by the challenged discriminatory conduct. As Wright and Miller have observed, this Court has applied "the basic equal-protection standing theory * * * without hesitation or difficulty." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.4 n.109, p. 222 (3d ed. 2008).[17]

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[13] See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973).

[14] See *Reynolds* v. *Sims*, 377 U.S. 533 (1964)

[15] See *Heckler*, 465 U.S. at 736-740.

[16] See *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 210-12 (1995).

[17] The borderline cases under the legal treatment rule have involved claims of race-based redistricting, or "racial gerrymandering," under *Shaw* v. *Reno*, 509 U.S. 630 (1993). Under *Shaw*, plaintiffs need not allege vote dilution or disparate weighting of votes. Rather, this Court has found a cognizable injury based on "representational harms"—namely, the notion that, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *United States* v. *Hays*, 515 U.S. 737, 744 (1995).

Few cases have analyzed standing under the Equal Protection Clause to challenge offensive government displays (such as Confederate flags). But there, too, the legal treatment rule has proved helpful. For example, in *Mississippi Division of United Sons of Confederate Veterans* v. *Mississippi State Conference of NAACP Branches*, 774 So. 2d 388 (Miss. 2000), several civil rights groups sued under Mississippi's Equal Protection Clause to enjoin the display of the state flag, which contained a depiction of the Confederate Battle Flag. Although the plaintiffs alleged that the flag stigmatized them on the basis of race, and although Mississippi's standing rules are "quite liberal" compared to the federal courts, *Burgess* v. *City of Gulfport*, 814 So. 2d 149, 152 (Miss. 2002), the Mississippi Supreme Court denied standing, explaining that "[n]either the flying of the State Flag, nor the flag itself, causes any constitutionally recognizable injury." 774 So. 2d at 390.

Thus, voters who reside in a racially gerrymandered district "ha[ve] been denied equal treatment" because they "may suffer the special representational harms racial classifications can cause in the voting context." *Id.* at 744-45.

Several members of the Court have criticized "representational harms" as too diffuse to support Article III injury—particularly when those harms are asserted by members of the majority race. *Bush* v. *Vera*, 517 U.S. 952, 1053 (1996) (Souter, J., dissenting); *Shaw* v. *Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting). But even assuming that "representational harms" push the limits of Article III injury, the legal treatment rule has still provided an easily administrable, bright-line rule for claims under *Shaw*: those who reside in a racially gerrymandered district, and thus suffer representational harms, have standing, *id.* at 904, while those who reside outside the district do not, *Hays*, 515 U.S. at 745-46.

Similarly, in *NAACP* v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990), the NAACP challenged Alabama's practice of flying the Confederate flag over the state capitol dome. Although the court did not consider standing, instead dismissing the case on the merits, its reasoning was much closer to a dismissal under *Allen* for lack of standing: "there is no unequal application of the state policy; all citizens are exposed to the flag[,] [and] [c]itizens of all races are offended by its position." *Id.* at 1562. In other words, the plaintiffs failed to allege that they had been "personally denied equal treatment" by the flying of the Confederate flag. *Allen*, 468 U.S. at 755.

2. Adopting *Allen*'s legal treatment rule (with minor modifications) in the Establishment Clause context would be particularly helpful. That rule would provide as follows: the "psychological consequence" of seeing offensive government conduct is not, by itself, sufficient to support standing (*Valley Forge*); rather, psychological consequences support standing only where (1) the plaintiff has been "personally denied equal treatment" on the basis of religion, *Allen*, 468 U.S. at 755, or (2) the plaintiff has been unwillingly subjected to government-sponsored religious exercises, *School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

In practice, such a rule would produce the same standing results in the vast majority of Establishment Clause cases. For example, when the government gives a benefit (such as a tax exemption) to religious groups but not secular groups, a secular group that was denied the benefit would have standing to sue on the basis of unequal treatment. See *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 7-8 (1989). Similarly, public school students who complain of reli-

gious exercises at school events—such as prayer at graduation, *Lee* v. *Weisman*, 505 U.S. 577 (1992), or Bible reading in the classroom, *Schempp*, 374 U.S. at 205—would have standing on the ground that, as a captive audience, they had been subjected to government-sponsored religious exercises.

Taxpayer standing would remain unchanged, so taxpayers offended by government funding of religious organizations would still have standing to sue. *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007). And even in the absence of taxpayer standing, individuals who were adversely affected by aid to religious groups—such as parents of public school students who were allegedly harmed by a voucher program benefiting religious schools—would also have standing to sue.

The only area where a legal treatment rule might make a difference is in religious display cases. For example, plaintiffs who are merely offended at seeing a religious symbol (or inconvenienced by a detour in response) would not have standing to sue because they have not been treated unfavorably on the basis of religion and, unlike public school students, they are not a captive audience.

But that does not mean there would be no basis for challenging religious displays. If a government appropriated tax dollars to support a religious display, taxpayers could have standing to sue. Similarly, if the government subjected a particularly sensitive captive audience (such as public school students) to a religious display, the captive audience members would have standing to sue. And if the government allowed private parties to erect displays,

but preferred one party over another on the basis of religion, the proponents of a rejected display would have standing to sue. See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009).

Of course, there might be a few cases where, under a legal treatment rule, no plaintiff would have standing to challenge a religious display. But that would be a strong indication that the subject matter is more appropriately committed "to the surveillance of Congress, and ultimately to the political process." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

In short, far from eliminating standing in religious display cases, the legal treatment rule would *rationalize* the standing inquiry in those cases.[18]

C. Focusing on the objective legal effects of the government's conduct is consistent with this Court's precedent and furthers the purposes of Article III.

1. The "legal treatment" rule has many benefits. First, and most importantly, it provides a persuasive explanation of what the Court has *already been do-*

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[18] Following *Allen*, some lower courts have already adopted a legal treatment rule in Establishment Clause standing cases. See, *e.g.*, *In re U.S. Catholic Conference*, 885 F.2d 1020, 1025-26 (2d Cir. 1989) (denying standing because the plaintiff ministers had alleged no "illegal government conduct directly affecting their own ministries") (citing *Allen*); *Americans United for Separation of Church & State* v. *Reagan*, 786 F.2d 194, 200 (3d Cir. 1986) (denying standing to non-Catholic religious groups that claimed to be stigmatized by the President's decision to extend diplomatic recognition to the Vatican).

ing, at least implicitly, in prior Establishment Clause cases.

Valley Forge is a prime example. There, the Court denied standing because the plaintiffs alleged mere psychological harm. If *Valley Forge* were based merely on the plaintiff's lack of "personal contact" with the transferred property, the plaintiffs could have circumvented the Court's ruling simply by visiting the transferred property and alleging that they were deeply offended by that personal contact. The legal treatment rule, by contrast, is not so easily manipulable. Plaintiffs would have standing only if, for example, they applied to have the property transferred to them but were denied in favor of a religious group.

Another case that illustrates the legal treatment rule at work is *Schempp*. There, public school children and their parents challenged laws requiring Bible reading and recitation of the Lord's Prayer in public schools. The Court found standing because the plaintiffs were "directly affected by the laws and practices against which their complaints are directed." 374 U.S. at 225 n.9. Or, as *Valley Forge* later put it, the plaintiffs "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 486 n.22. Far from couching the standing analysis in terms of the plaintiffs' offense, the Court focused on the objective legal effect of the government's conduct.

Of course, the result in *Schempp* would have been the same under a more lenient "personal contact" rule. But assume, for example, that an adult atheist was also present in the classroom as a voluntary

guest (for Show-and-Tell, for example). Under a "personal contact" rule, although the atheist is, as a practical matter, nothing more than a concerned bystander, he would almost certainly have standing to sue. See *Washegesic*, 33 F.3d at 683 (visitor to public school had standing). By contrast, the offended atheist would not have standing to sue under the legal treatment rule: as a voluntary guest, he is free to leave at any time; he is not subject to any coercion; and he has not been denied equal treatment on the basis of religion. As explained in Section I.C. below, such a result far better comports with the purposes of Article III.

In contrast with *Valley Forge* and *Schempp*, this Court's display cases have been completely silent on the question of standing.[19] Because standing was never raised, and the relevant facts were never discussed, it can be difficult to tell whether the results would have been any different under a legal treatment rule. But many of those cases are perfectly consistent with the legal treatment rule.

In *Summum*, for example, the City accepted and displayed a Ten Commandments monument from one group, but rejected another religious monument from a different group. 129 S. Ct. at 1129-30. Under a legal treatment rule, the proponent of the rejected monument would have had standing to bring an Establishment Clause challenge because it could have

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[19] See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009); *Van Orden* v. *Perry*, 545 U.S. 677 (2005); *McCreary County* v. *ACLU*, 545 U.S. 844 (2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch*, 465 U.S. at 671; *Stone* v. *Graham*, 449 U.S. 39 (1980).

alleged differential treatment. Similarly, in *Stone*, public school students who were forced, as a captive audience, to view posters of the Ten Commandments would also have standing under a legal treatment rule. 449 U.S. at 42. And in *Lynch* and *Allegheny*, the Court accepted the exercise of jurisdiction by lower courts that rested, either expressly or impliedly, on taxpayer standing. See *Donnelly* v. *Lynch*, 691 F.2d 1029, 1031-32 (1st Cir. 1982) (plaintiffs had standing as municipal taxpayers); *ACLU* v. *County of Allegheny*, 842 F.2d 655, 657-58 (3d Cir. 1988) (citing county and city aid to creche and menorah).

2. The legal treatment rule also harmonizes standing in Establishment Clause cases with standing in free exercise cases. This Court has long rejected the notion that standing should be a "sliding scale" that is easier to satisfy for some constitutional challenges than for others. *Valley Forge*, 454 U.S. at 484. Yet many scholars have noted the wide discrepancy between how courts treat standing in Establishment Clause cases versus standing in other areas of the law.[20] As Michael McConnell has argued, the problem of offensive messages "applies with equal strength to equal protection and free exercise claims, but the Court has recognized that the costs of recog-

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[20] See, *e.g.*, Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. Rev. 1345, 1351-52 (2001) ("*With the notable exception of claims under the Establishment Clause*, the Court's general response is that when everyone has been affected equally by a governmental decision, no one has standing.") (emphasis added); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993).

nizing [standing for] such claims outweigh the benefit. *There is no evident reason to treat establishment claims with greater solicitude.*" McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 165 (1992) (emphasis added).

Like the standing inquiry in equal protection cases, the standing inquiry in free exercise cases is based on the legal treatment of the plaintiff. To establish standing to sue under the Free Exercise Clause, it is not enough to allege that government action is offensive, or even hostile, to the plaintiff's religious beliefs; rather, the plaintiff must allege that government action affirmatively interfered with the exercise of those beliefs. See *Braunfeld* v. *Brown*, 366 U.S. 599, 615 (1961) (Brennan, J., concurring and dissenting) (plaintiff must "show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause").

In *Harris* v. *McRae*, for example, a religious group brought a free exercise challenge to federal restrictions on abortion funding, alleging that the restrictions would burden some women who, "as a matter of religious practice and in accordance with their conscientious beliefs," would otherwise have obtained an abortion. 448 U.S. 297, 320-21 (1980). This Court, however, denied standing, reasoning that no member of the religious group "contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion." *Id.* at 321 n.24 (quoting *Allen*, 392 U.S. at 249) (emphasis and alterations in

original).[21] By contrast, where the plaintiff alleges that the government has denied him equal treatment because of his religion,[22] or otherwise interfered with his religious exercise,[23] this Court has found standing.[24]

3. Finally, the legal treatment standard furthers the underlying purposes of Article III. The doctrine of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. Its primary function is to "prevent[] courts of law from undertaking tasks assigned to the political branches." *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996). It also prevents courts from unnecessarily deciding constitutional questions, and prevents litigants from converting the judicial process into "no more than a vehicle for the vindication of the value interests of

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[21] See also *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961) (store employees lacked standing to challenge Sunday closing laws under the Free Exercise Clause because "they d[id] not allege any infringement of their own religious freedoms due to Sunday closing").

[22] *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)).

[23] See, *e.g.*, *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985) (imposition of minimum wage and recordkeeping requirements).

[24] Moreover, lower courts have had little difficulty applying this standard. See, *e.g.*, *Tarsney* v. *O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) ("perceived moral injury" from use of state money to pay for abortions was not a cognizable injury; plaintiffs "must identify a direct injury they have experienced from state interference" with their exercise of religion).

concerned bystanders." *Valley Forge*, 454 U.S. at 473-74.

Under a personal contact rule, offended observers can marshal federal courts to sit in judgment on all manner of political decisions—from the design of city seals to the arrangement of holiday Christmas displays—regardless of whether those political decisions have any legal effect on the offended observer. By contrast, the legal treatment rule ensures that if courts are to exercise the "ultimate and supreme function" of judicial review over these sorts of decisions, *ibid*, they do so only on behalf of plaintiffs who have suffered a concrete legal harm—namely, unfavorable treatment on the basis of religion, or coerced participation in unwelcome religious exercise. Such a rule not only reduces unnecessary judicial interference with the political branches, but also limits judicial review to its intended purpose—namely, serving as a "formidable means of vindicating individual rights." *Id.* at 473. In short, it better serves the fundamental purposes of Article III.

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Mr. Buono claims standing not because he has been denied equal treatment on the basis of religion (*Allen*), and not because he has been unwillingly subjected to government-sponsored religious exercises (*Schempp*), but simply because he is "deeply offended by the cross display." Pet. App. 105a-107a. Under the legal treatment rule, such psychological offense is an insufficient basis for Article III standing, and this Court should dismiss the case for lack of jurisdiction.

II. The endorsement test collapses in self-contradiction because monuments more often than not convey multiple messages.

Although the Court need not reach the merits, if it does so, it will once again find that the endorsement "test" offers no principled basis for reaching a decision. See, *e.g.*, *Van Orden*, 545 U.S. at 691-92 (plurality opinion) (not applying the endorsement test); *id.* at 699-701 (Breyer, J., concurring) (same). The problem at the heart of the endorsement test is its assumption that every monument conveys only one objective message. But most monuments convey multiple messages, and reasonable observers can disagree about which message is the objective one. The endorsement test thus forces judges to pick a single, "objective observer" message from among the many messages reasonably conveyed—a task that is inherently subjective and unpredictable, and especially so in this case.

A. The endorsement test is unhelpful when a monument conveys more than one message.

In the 25 years since it was first proposed in *Lynch*, 465 U.S. at 687-694 (O'Connor, J., concurring), the endorsement test has spawned a jurisprudence of contradiction. The seed of the contradiction lies in the need to imagine an "objective observer" who must carry out an inherently subjective and ultimately impossible task: attributing a single reasonable "message" to symbols that can be reasonably interpreted by different observers to convey different, and often contradictory, messages.

1. The endorsement test, whether referring to an "objective observer" or a "reasonable observer," has tacitly (and perhaps unconsciously) assumed that the imagined observer would perceive only one message. See *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("***The*** meaning of a statement to its audience depends both on the intention of the speaker and on ***the*** 'objective' meaning of the statement in the community.") (emphasis added); *Thornton* v. *Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("***The*** message conveyed is one of endorsement of a particular religious belief.") (emphasis added); *McCreary*, 545 U.S. at 860 (display "sends ***the*** * * * message to * * * nonadherents that they are outsiders") (internal quotations omitted; emphasis added); *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("to determine ***the*** message that the text here conveys, we must examine how the text is *used*") (first emphasis added). In each of these examples, it would be more accurate to replace the word "the" with "one possible."

Justice O'Connor explained the single-message assumption in her controlling concurrence in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753 (1995). Although acknowledging that "[t]here is always *someone* who, with a particular quantum of knowledge, ***reasonably*** might perceive a particular action as an endorsement of religion," she explained that this problem could be overcome by making the endorsement test a "collective standard" based on "a personification of a community ideal of reasonable behavior." *Id.* at 779-80 (second emphasis added). Such a standard would identify "***the*** 'objective' meaning of the [government's] statement in the

community." *Id.* at 779 (emphasis added); see also *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 34-45 (O'Connor, J., concurring).

In short, as acknowledged in the controlling concurrence in *Pinette*, there are typically different *reasonable* interpretations of a particular symbol or text, depending on the interpretive standpoint of the observer; but once an objective observer is made aware of the right facts about the display, then there is only one "objective" conclusion to be reached.

2. Ever since the inception of the "objective observer" test, the single message assumption has been questioned.

Most recently, this Court squarely rejected the single-message assumption in a free speech case—*Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). There, the Court emphasized that any given monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* at 1135. In fact, not only may monuments mean different things to different observers, but those involved in a monument's display—creators, donors, government—may *intend* to convey different messages:

> Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city

> property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.

Id. at 1136.

The Court also explained that "[t]he 'message' conveyed by a monument may change over time." *Ibid.* A study of war memorials, for example, "found that 'people reinterpret' the meaning of these memorials as 'historical interpretations' and 'the society around them changes.'" *Ibid.* (quoting J. Mayo, *War Memorials as Political Landscape: The American Experience and Beyond* 8-9 (1988).

The single message assumption has also been a point of frequent contention in Establishment Clause cases. In his dissent in *Pinette*, for example, Justice Stevens argued that different observers might have different interpretations of the challenged cross: "while this unattended, freestanding wooden cross was unquestionably a religious symbol, [some] observers may well have received completely different messages from that symbol. Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion * * * ." 515 U.S. at 798.

Similarly, in his controlling concurrence in *Van Orden*, Justice Breyer wrote that Ten Commandments monuments "can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message." *Van Orden*, 545 U.S. at 701

(Breyer, J., concurring). And in *Allegheny*, Justice Kennedy criticized the majority's single-message approach, arguing that it forces the courts to "assume[] the difficult and inappropriate task of saying what every religious symbol means." *Allegheny*, 492 U.S. at 678.

Leading academics have also argued that the endorsement test gives courts no neutral basis for selecting among multiple reasonable meanings:

> Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no "neutral" position, outside the culture, from which to make this assessment. The bare concept of "endorsement" therefore * * * is nothing more than an application to the Religion Clauses of the principle: "I know it when I see it."

McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 148 (1992).

Several scholars have drawn a helpful analogy to race, arguing that just as a racially charged symbol may be interpreted differently depending on the observer's racial background, so too a religious symbol may be interpreted differently depending on the observer's attitude toward religion. See, *e.g.*, Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. Mich. J.L. Reform 247, 279-82 (2003) (collecting examples). Still others have drawn on the philosophy of language and metaphysics, arguing that there is no single objective meaning for a particular government act. See, *e.g.*, Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Al-*

ternative to Current Establishment Clause Doctrine, 40 DePaul L. Rev. 53, 83-86 (1990); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 Md. L. Rev. 506, 554-56 (2001). But the common conclusion has been that the single message assumption of the endorsement test is wrong, and that it often "serves only to mask [the judiciary's] reliance on untutored intuition." McConnell, 59 U. Chi. L. Rev. at 151.

In sum, the crucial assumption that every symbol communicates a single "objective" meaning is doubtful, both as a matter of fact and as a matter of basic hermeneutics. This Court has already rejected that assumption in the free speech context; it should do the same under the Establishment Clause.

B. The endorsement test is unhelpful here because the Mojave Desert cross conveys more than one message.

The Mojave Desert cross is one of those "monuments [that] are almost certain to evoke different thoughts and sentiments in the minds of different observers." *Summum*, 129 S. Ct. at 1135. To its creators, it was a remembrance of their comrades fallen in battle. To those who maintained it, it sent a message of gratitude to America's veterans for their sacrifice. For National Park Service employees, it might be another historic monument to be maintained on a small budget. For a casual Christian observer today, it might be an unexpected *vox clamantis in deserto*. For an agnostic onlooker, it might be an unwelcome reminder of the beliefs of others. For a student of the history of California, it might be a tangible reminder of that history.

Each of these impressions is reasonable, but they are not the same. Because objective observers can and do disagree about what the Mojave Desert cross means, this Court cannot pick one of those meanings without itself engaging in a subjective and ultimately unpredictable exercise.

* * * * *

In the end, the endorsement test fails on the merits for the same reason it fails with respect to standing. With standing, it depends too much on the subjective, incommunicable, and ultimately unpredictable perceptions of the individual plaintiff. On the merits, it depends too much on the subjective, incommunicable, and ultimately unpredictable perceptions of individual judges. Neither dependency comports with the rule of law.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's ruling should be reversed, and the case dismissed for lack of standing.

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AMICUS CURIAE BRIEF

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No. 08-472

FILED

JUN 8 - 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE BOY SCOUTS OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* *

Boy Scouts of America ("Boy Scouts") and its local council in San Diego have petitioned this Court for *certiorari* in *Barnes-Wallace* v. *Boy Scouts of America*, 530 F.3d 776 (9th Cir.), *rehr'g denied*, 551 F.3d 891 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222), a case that presents a standing question closely related to the standing question in *Buono* v. *Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.*, *Salazar* v. *Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08 472). The standing decision in *Barnes-Wallace* relies heavily upon the Ninth Circuit's earlier decision in the *Buono* litigation, and the Ninth Circuit has now stayed proceedings in *Barnes-Wallace* pending this Court's decision on the merits in *Buono* and resolution of Boy Scouts' petition for *certiorari*. Boy Scouts has requested that the Court decide *Barnes-Wallace* and *Buono* together.

Boy Scouts of America

Boy Scouts is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 644 (2000). More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing.

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* The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Boy Scouts' mission is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law." All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,[1] which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight." *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall* v. *Orange County Council, Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998). The Plaintiffs in *Barnes-Wallace* do not challenge Boy Scouts' membership criteria.

Boy Scout Leases with the City of San Diego

The City of San Diego leases a campground in Balboa Park and a half-acre aquatic center on Fiesta Island in Mission Bay Park to the Boy Scouts' local council in San Diego and Imperial Counties ("San Diego Boy Scouts") for use by both Boy Scouts and the public. The lease of Camp Balboa to San Diego Boy Scouts is substantially

---

1. The Scout Oath states that "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Id.*

similar to leases to Girl Scouts and Camp Fire of adjacent campgrounds in Balboa Park. The Fiesta Island lease to San Diego Boy Scouts was made at the request of 42 youth-serving organizations to the City that San Diego Boy Scouts was the best organization to operate such a lease, and San Diego Boy Scouts thereafter built the aquatic center on Fiesta Island with $2.5 million of its own funds. Both Camp Balboa and the Youth Aquatic Center are open to the public on a first-come, first-served basis, and are used by the public extensively.

The City leased the two properties to San Diego Boy Scouts for entirely secular public purposes of providing camping and aquatic facilities for the public. Camp Balboa offers camping, swimming, archery, and meeting space to the public at nominal fees. The Youth Aquatic Center offers kayaks, canoes, sail and rowboats, and meeting space to youth groups at inexpensive rates. The City spends nothing on the properties leased to San Diego Boy Scouts. *See* 530 F.3d at 781. San Diego Boy Scouts maintains and administers the properties at no cost to the City, and the City and the public are beneficiaries of the millions of dollars San Diego Boy Scouts have invested in improvements. *See id.*

Establishment Clause Challenge to the Leases

Boy Scouts have been defending the leases for almost a decade of litigation brought by Plaintiffs who simply disagree with Boy Scouts' values. Plaintiffs, who identify themselves as an agnostic couple and their minor child and a lesbian couple and their minor child, 530 F.3d at 780, have never sought to use the Youth Aquatic Center or Camp Balboa, *id.* at 782. No person

seeking to use the properties has been discriminated against in violation of the leases. 275 F. Supp. 2d at 1282. Rather, Plaintiffs object to the leases based on what they "feel" and "believe" about Boy Scouts and sued to require the City to lease to another nonprofit that is more acceptable to them.

Plaintiffs alleged that the leases violate the Establishment Clauses of the U.S. and California Constitutions, the "No Preference" Clause of the California Constitution, the Equal Protection Clauses of the U.S. and California Constitutions, the "No Aid" Clause of the California Constitution, and California common law.

In a pair of decisions in 2003 and 2004, the district court held that because Boy Scouts' private speech requires that members promise to do their duty to God, the City established religion by negotiating the leases exclusively with San Diego Boy Scouts. *See* 275 F. Supp. 2d at 1273-76. Even though the process followed was public and entirely typical, *see id.* at 1274 75, and even though the City selected San Diego Boy Scouts because it "alone is best suited to fulfill the City's needs with respect to the parkland," *id.* at 1287, the district court held that exclusive negotiations with San Diego Boy Scouts were not neutral because, by definition, they were not equally open to "the religious, areligious and irreligious," *id.* at 1275. The district court concluded that the lack of competitive bidding was necessarily an Establishment Clause violation.

Having originally rejected municipal taxpayer standing and held in abeyance the federal standing question, the district court never addressed the federal standing question.

The Ninth Circuit's Standing Decision

After a protracted appeals process, the Ninth Circuit concluded that Plaintiffs had standing and certified questions concerning the application of the California Constitution to the California Supreme Court.[2] 530 F.3d at 779, 784-86. In particular, the Ninth Circuit held that Plaintiffs had injury-in-fact by being "offended" at Boy Scouts' traditional values, having "aversion to the facilities," and feeling "unwelcome there." 530 F.3d at 783, 784. Plaintiffs avoided property leased to San Diego Boy Scouts "because they object to the Boy Scouts' presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts' representatives in order to gain access to the facilities." *Id.* at 784. The majority of the panel did not address the question of whether there is, in fact, an Establishment Clause violation here, but, assuming federal standing, the majority appears inclined to examine the case under the California Constitution instead.

In dissent, Judge Kleinfeld pointed out that the theory of standing accepted by the majority conflicts with this Court's requirement that there be a concrete injury rather than merely personal dissatisfaction. *Id.* at 794-95. He described the majority's new theory of standing as both unprecedented and a threat to the First Amendment:

> There is a distinction important to our liberties between having a legally protected

2. On April 1, 2009, the California Supreme Court declined to answer the questions certified by the Ninth Circuit.

> interest and having an interest in not being offended. Some people may feel 'degraded' or 'offended' because of the Boy Scouts' positions on reverence and sexuality but so long as their access is unimpaired, the feeling is no stronger a basis for standing than the feelings others may have about atheists or lesbians managing the facility. By treating the Barnes-Wallaces and Breens revulsion for Boy Scouts and consequent avoidance of a place the Boy Scouts manage as conferring standing, we extend standing to a claim that precedent does not support. And we assist in a campaign to destroy by litigation an association of people because of their viewpoints. A feeling of revulsion for others who have different beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing.

530 F.3d at 798.

Boy Scouts sought *en banc* review, arguing that the majority's standing decision was inconsistent with *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and precedent from other courts of appeals. The court of appeals denied en banc review on December 31, 2008. *Barnes-Wallace* v. *Boy Scouts of America*, 551 F.3d 891, 892 (2008). In a dissent joined by five other judges, Judge O'Scannlain concluded that "the three-judge panel majority's unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost anything has standing to air his or

her displeasure in court." *Id.* This theory "contradicts nearly three decades of the Supreme Court's standing jurisprudence" and has not been accepted by any other circuit. *Id.* "Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact." *Id.*

On March 31, 2009, Boy Scouts filed a petition for a writ of certiorari with this Court (No. 08-1222) seeking review of the Ninth Circuit's standing decision. The Ninth Circuit has since stayed the proceedings.

ARGUMENT

The principle that standing cannot be based on merely feeling offended stated in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), should be reaffirmed here. In the absence of such a reaffirmation, the floodgates would open for Establishment Clause challenges, which threaten the First Amendment rights of organizations that are required to defend themselves over and over again.

A. Article III Standing Cannot Be Based on Merely Feeling Offended

This Court has long held that merely feeling offended by government action does not give rise to standing to sue. *See Allen* v. *Wright*, 468 U.S. 737, 752-55 (1984); *Valley Forge*, 454 U.S. at 473; *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992). To permit standing based merely on feeling offended would

transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders," *Allen*, 468 U.S. at 756 (citation omitted), or a "a judicial version of college debating forums," *Valley Forge*, 454 U.S. at 473.

This Court's holding in *Valley Forge* should be dispositive in *Buono* and *Barnes-Wallace*. In *Valley Forge*, the federal government had given to the Valley Forge Christian College, free of charge, a 77-acre tract of land appraised at $577,500. 454 U.S. at 467-68. The deed required the college to use the property for 30 years solely for a school that met the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God, and the Veterans Administration. *Id.* at 468. The college, which required its faculty to be "baptized in the Holy Spirit" and to live "Christian lives" and its administrators to be affiliated with the Assemblies of God, planned to use the property to expand its training of "'men and women for Christian service as either ministers or laymen.'" *Id.* at 468-69 (citation omitted).

The Third Circuit found standing based on a violation of the plaintiffs' constitutional right to be free from government establishment of religion. *See id.* at 482-83. This Court reversed, noting that Article III of the Constitution

> requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the

> defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

454 U.S. at 472 (internal quotations and citations omitted). The plaintiffs in *Valley Forge*, however,

> fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86 (emphasis in original).

Notwithstanding *Valley Forge*, the Ninth Circuit concluded that Respondent Buono has standing because he feels offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. Likewise, in *Barnes-Wallace*, the Ninth Circuit concluded Plaintiffs have standing because they feel "offended" that Boy Scouts is the lessee and suffered "both personal emotional harm and the loss of recreational enjoyment" 530 F.3d at 785, as a result of their refusal to use the property.

The Ninth Circuit's standing decisions in *Buono* and *Barnes-Wallace* are in conflict with the decisions of this Court and of other courts of appeals, which follow *Valley*

Forge and reject standing based on merely feeling offended resulting from some government conduct. The Ninth Circuit's holding here is a radical expansion of standing far beyond the limits heretofore observed in other courts of appeals. On the Ninth Circuit's reasoning, plaintiffs would have standing if the government employed an Orthodox Jew or a Muslim as a park ranger in charge of permitting access to the parkland. As Judge O'Scannlain wrote for five other Ninth Circuit judges in dissent in *Barnes-Wallace*, "[n]o other circuit has embraced this remarkable innovation," according to which "almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court." 551 F.3d at 892.

B. The Ninth Circuit's Standing Decisions in *Buono* and *Barnes-Wallace* Are a Grave Threat to First Amendment Rights

The Ninth Circuit has radically expanded standing jurisprudence in *Buono* and *Barnes-Wallace*, opening the courthouse doors to anyone claiming to be offended by any government action under the Establishment Clause and threatening the First Amendment rights of organizations that are the target of attacks.

As this Court recently underscored, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341-42 (2006) (brackets in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Standing requirements ensure that judicial review "is

not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)).

This limitation is applied particularly rigorously in Establishment Clause cases, where standing cannot be based on mere disagreement with the government's action but rather exists only if a plaintiff can demonstrate the specific expenditure of actual taxpayer funds in support of religion, *see, e.g.*, *Flast* v. *Cohen*, 392 U.S. 83, 102-03 (1968), or direct exposure to unquestionably religious expression by the government, such as the display of giant crosses on public land, *see, e.g.*, *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986). The basis for the strict application of the constitutional standing requirements in the Establishment Clause context is that unnecessary governmental intervention in religious matters can itself endanger religious freedom. *See Van Orden* v. *Perry*, 545 U.S. 677, 683, 699 (2005); *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 845 46 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"). As Judge Kleinfeld wrote in dissent in *Barnes-Wallace*, by allowing standing based merely on feelings of revulsion, the court of appeals "assist[s] in a campaign to destroy by litigation an association of people because of their viewpoints." 530 F.3d at 798.

The Ninth Circuit's standing decisions in *Buono* and *Barnes-Wallace* effectively eliminate any meaningful limits on standing to bring an Establishment Clause challenge. Prisoners have a new section 1983 claim if they object to the presence of a prison chapel that they steadfastly avoid. Every would-be litigant can now sue for denial of access to the courts on Establishment Clause grounds if he or she claims to avoid the courts because there are images of Moses and the Ten Commandments there. Mr. Newdow now has standing to proceed with an Establishment Clause challenge to the Pledge of Allegiance if he claims to avoid government property where "one Nation under God" is recited.

These are not far-fetched examples. The court of appeals' decision is already being followed as precedent to expand standing. A district court in San Diego permitted Jewish War Veterans and several individuals to challenge Congress' acquisition of the land surrounding the Mt. Soledad cross and the presence of the cross on federal property as violations of the Establishment Clause. *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199, 1202, 1204-05 (S.D. Cal. 2008). Plaintiffs based their standing to bring the suit on their feeling offended at the presence of the cross in a war memorial. *See id.* at 1204-05:

> If Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing. . . . In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish "injury in fact."

Id. at 1205 (citing *Barnes-Wallace*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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June 2009

AMICUS CURIAE BRIEF

No. 08-472

In The

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERESTS OF AMICUS CURIAE[1]

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amicus* submits this brief because the boundaries between government and religion are an essential part of our free society, and because allowing access to the courts is critical to maintaining those boundaries.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government cannot be allowed to circumvent the Establishment Clause with formalistic gestures that fail to accomplish genuine separation between Church and State.

If the Constitution's prohibition on government sponsorship of religion is to have force, those who are directly exposed to and affected by government-sponsored religious displays must be permitted to challenge them in the federal courts. Plaintiffs cannot be turned away at the courthouse steps because their views are demeaned as merely psychological or only policy disagreements as opposed to objections arbitrarily deemed "spiritual." Adding

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution intended to fund its preparation or submission. The Petitioner has filed a blanket consent and the consent of the Respondent is being lodged herewith.

a new "spiritual" injury requirement to the test for standing, as the government urges, would force courts to engage in an inappropriate philosophical debate into Establishment Clause plaintiffs' internal belief structures. That requirement is not supported by precedent, which focuses on the nature of a plaintiff's contact with the display rather than the beliefs giving rise to offense. Of particular concern to *amicus*, the distinction proposed by the government would risk creating an improper hierarchy of belief systems, denying access to the courts by those whose views are not based on religious tenets. And it would force the Court to wade into the quagmire of deciding what constitutes a religious belief, further muddying the standing inquiry.

The Court must also mandate an appropriately searching review of land transfers purporting to cure Establishment Clause violations. Fashioning a rule or presumption that land transfers remedy any Establishment Clause problem risks creating a dangerous loophole, allowing governmental sponsorship of religion through artful means designed to create the false appearance of compliance with the Establishment Clause. As the Court has consistently done in the past when reviewing Establishment Clause challenges to government action, it should ask whether, based on a thorough and fact-intensive review, the transfer creates a genuine distance between the government and the display.

Neither the purpose nor the effect of the land transfer in this case was to distance the government from the cross display. The challenged legislation was designed to ensure that the cross would remain standing on Sunshine Rock in the midst of the federal parkland. In particular, the government's reliance on the supposed ability of Veterans of Foreign Wars ("VFW") to install some different monument

in place of the cross is without merit. Any choice that the VFW has to install a different, secular monument is wholly theoretical; it does not distance the cross from the government's imprimatur. The government transferred the land to those who erected the cross in the first place precisely because it wanted the cross to remain standing. The Court should hold the land transfer invalid, and prevent use of such formalistic devices from multiplying across the country as a court-sanctioned way to feign compliance with the Establishment Clause.

ARGUMENT

I. STANDING TO CHALLENGE A GOVERNMENT-ENDORSED RELIGIOUS DISPLAY DOES NOT REQUIRE A PLAINTIFF TO SHOW ADHERENCE TO CONTRARY RELIGIOUS BELIEFS.

The government urges a dangerous and unwarranted test of whether a plaintiff has standing to challenge a government-endorsed religious display under the Establishment Clause. Where the plaintiff has a "*spiritual* stake" in the controversy, standing would be found. Pet'rs Br. 14-15 (emphasis added) (quotation omitted). In contrast, what the government terms a mere "psychological consequence" of observing the display -- including the "dislike, distress, or offense, however genuine" produced by observation -- would be insufficient. Pet'rs Br. 16; *see also id.* at 14 ("value or policy disagreements" are disfavored bases for standing). The government's proposed standing inquiry thus turns on the nature of the plaintiff's belief structure rather than the objective facts concerning exposure of the plaintiff to the challenged display. Such an inward-focused test would be contrary to precedent, would

improperly favor "religious" objectors to the exclusion of all others, and would turn standing inquiry into an unworkable morass.[2]

A. Standing Properly Focuses On The Facts Concerning Exposure To The Offensive Display, Not On The Nature Of The Plaintiff's Internal Belief Structure.

To assess standing, this Court's precedent has uniformly looked to objective facts such as plaintiff's past and expected future exposure to the challenged display, not at the nature of the plaintiff's underlying beliefs.

Standing "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (emphasis omitted); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J. concurring)). To show such a "personal stake," plaintiffs must allege that they are "directly affected [by the challenged action] apart from [their] special interest in the

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[2] In its petition for certiorari, the government argued explicitly that standing should be denied because Respondent's objection to the display is "ideological, rather than religious." Pet. 5. Though retreating from that phrasing in its merits brief, the government urges the same distinction by arguing that Respondent lacks standing because his beliefs are merely "psychological consequences" of viewing the display or "policy disagreements" as opposed to the supposedly required "spiritual stake." Pet'rs Br. 14-15.

subject." *Lujan*, 504 U.S. at 556; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.").

To determine whether harm is sufficiently "concrete," "personal," and "direct" to fulfill the injury-in-fact component of standing, the Court has looked to such ascertainable measures as whether the plaintiff has been (and will be in the future) physically exposed to the challenged governmental conduct or the results of that conduct. The Court has used this mode of inquiry in the Establishment Clause context, as well as in environmental cases that are analogous because they also involve interference with the use and enjoyment of public land. *See* Pet. App. 107a (Respondent's "inability to unreservedly use public land" constitutes injury-in-fact).

The plaintiffs in *Valley Forge* lacked the requisite personal stake because they lived in different states from the property at issue and therefore lacked any direct contact with the challenged conduct. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487 (1982). Similarly, the plaintiffs in *Lujan* lacked standing because they had not alleged any definite intention to visit locations where they would personally observe the endangered species allegedly threatened by the challenged government action. *Compare Lujan*, 504 U.S. at 564 ("'Some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require."), *with id.* at 566 ("It is clear that the person who observes or works with a

particular animal threatened by a federal decision is facing perceptible harm."). In *Summers*, the plaintiff likewise lacked standing because he failed to allege a firm intent to visit a particular National Forest that would be affected by an allegedly unlawful project. *Summers*, 129 S. Ct. at 1150 ("[Plaintiff's affidavit] does not assert . . . any firm intention to visit their locations, saying only that [plaintiff] 'want[s] to' go there.").

Respondent is unlike all of those plaintiffs discussed above who, the Court found, objected to a governmental policy from a safe distance but did not demonstrate the requisite direct exposure to the challenged governmental conduct or its untoward effects. Respondent has viewed the government-sponsored religious display; he intends to visit the Preserve where the cross is displayed in the future; and he will alter his conduct to avoid the cross. J.A. at 64-65. In a detailed affidavit, Respondent states that he "regularly" visits the Preserve -- approximately 2-4 times per year -- and intends to do so at least that frequently, if not more often, in the future. *Id.* at 64. The cross "deeply offends" him, "impairs [his] enjoyment of the Preserve," and will cause him to go out of his way to avoid encountering the display. *Id.* at 64-65. Respondent has demonstrated a personal stake in the outcome of the case and direct injury based on these facts.

Moreover, the core purposes of standing are amply served by applying the existing mode of inquiry, which permits those plaintiffs actually exposed to an offensive religious display to mount a challenge. Standing is meant, in part, to uphold the separation of powers by preventing plaintiffs from bringing "generalized grievances" about governmental conduct that could be brought by every citizen. *See, e.g., Valley Forge*, 454 U.S. at 482-83. The Court has

also stated that standing serves to "preserve[] the vitality of the adversarial process" by ensuring that questions are resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J. concurring)). Allowing Respondent to sue by virtue of his personal exposure to the cross creates no worry that government displays could be challenged from afar by anyone who disagrees with a display, irrespective of proximity to or contact with it. There is no danger that the federal courts would be turned into "ombudsmen of the general welfare," *Valley Forge*, 454 U.S. at 487, if those individuals who actually view a display during their work or recreation, or who are forced to change their conduct on account of the display, are granted standing. Allowing standing under these circumstances will simply permit an individual who has suffered a direct injury to vindicate his rights. There is no cause to impose a newly-minted requirement that to bring suit, a plaintiff must establish a "religious" injury resulting from contact with a challenged display.

B. This Court's Precedent Demonstrates That Holding A Contrary Religious Belief Is Not Required To Have Standing.

Whether offense at the government-sponsored display is based on a religious disagreement with the cross is immaterial. The Court has never made a distinction based on whether the injury is sufficiently "spiritual" or whether, as the government suggests, it reflects a mere "commitment to certain constitutional views." Pet'rs Br. 14-16. Nor has the Court imposed a requirement that an injury under the Establishment Clause be rooted in religious beliefs or

membership in a religious group different from that endorsed by the challenged display.

The Court has thus repeatedly addressed the merits of an Establishment Clause challenge where the plaintiff has not professed a "religious objection" to the conduct in question. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court reached the merits despite the plaintiff's testimony in the district court that he was "not religious" and that "he does not acknowledge the existence of any god, and he specifically does not adhere to either the Christian faith or the Jewish faith." *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (Oct. 2, 2002 W.D. Tex. 2002) (plaintiff testified that the religious display in question "symbolizes a state policy to favor the Jewish and Christian religions over other religions and over non-believers, which 'policy' the Plaintiff finds to be personally offensive"). Similarly, the plaintiffs in one of the two appeals decided in *Schempp* were "professed atheists," whose petition "particularized [their] atheistic beliefs." 374 U.S. at 211-12. Moreover, when plaintiffs of various professed faiths have challenged a display, this Court has not analyzed whether their offense was religious in nature. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[3]

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[3] It is not self-evident that an objection by a religious person to a display endorsing a different religion would be any more "spiritual" than Respondent's. For example, a Jewish person would presumably not have any religious objection to the display of a cross on the grounds of a neighborhood church, but might well object to the municipality installing a prominent cross in the middle of the town square. Such an objection would be directed at *the government's* endorsement of the cross; not to the teachings of any religious doctrine or to crosses generally. It is unclear under the government's proposed test whether such an objection to the government's display of a cross would be deemed "spiritual" or a mere "commitment to certain constitutional views." Pet'rs Br. 14-16. If

The Court also has never imposed any requirement that the plaintiff be a member of a religious group different from the religion allegedly endorsed by the display. *Compare* Pet'rs Br. at 4-5, 14 (arguing that plaintiff lacks standing because he is a Catholic and the display is a Christian symbol), *and id.* at 15 (standing must be premised on feelings of being an "outsider"), *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (Mormon and Catholic plaintiffs challenged a school district policy permitting student-led nonsectarian prayers before football games), *and Lee v. Weisman*, 505 U.S. 577, 584 (1992) (Jewish plaintiffs' objection to a nonsectarian prayer offered by a rabbi at a middle school graduation was acknowledged by this court to be a "live and justiciable controversy").[4]

The government misreads this Court's precedent in urging that beliefs deemed only "philosophical" are unworthy of standing. In *Valley Forge*, the plaintiffs lacked standing because they "failed[ed] to identify any *personal* injury suffered by them as a consequence of the alleged constitutional error." 454 U.S. at 485 (emphasis altered). That is because the plaintiffs in *Valley Forge* had only read about the challenged action in a news release. *Id.* at 487 ("Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court."). The Court's rejection of standing had nothing to do with the nature of the plaintiffs' beliefs and whether their offense was motivated

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the latter, then it is hard to imagine anyone who would have standing under the government's proposed test.

[4] Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional*, 9 BYU J. PUB. L. 291, 292 (1995) (noting that plaintiffs in *Lee v. Weisman* were Jewish).

by religious concerns. Moreover, the Government's suggestion that *Schempp* has been read to mean that a "spiritual" injury is required to find standing is erroneous. Pet'rs Br. at 14 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970)). As noted above, certain of the plaintiffs addressed by *Schempp* were atheists. *Schempp*, 374 U.S. at 211. Nevertheless, all of the plaintiffs in *Schempp* suffered injury because they were "directly affected by the laws and practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 487 n.22 (quotation omitted).

In fact, the Court has scrupulously avoided looking inward into the genesis of the plaintiff's offense at the government-sponsored religious display. The Court has thus explicitly rejected the assessment of standing through examination of the plaintiff's motives or intensity of plaintiff's internal beliefs. *See id.* at 486 n.21 ("[T]he essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.'" (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952))); *id.* at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."). Nor have cases dealing with injury to the use of public land shown concern with why the plaintiff felt his or her enjoyment to be diminished. So long as the plaintiff can show that the harm is "concrete and particularized," a harm affecting "the recreational or even the mere esthetic interest of the plaintiff . . . will suffice." *Summers*, 129 S. Ct at 1149 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972)). The proper focus of standing under the Court's established precedent is on the directness of the plaintiff's exposure to the challenged governmental conduct, not the philosophical underpinnings of the offense.

C. A Standing Test Based On The Nature of A Plaintiff's Beliefs Would Improperly Favor Some Belief Systems Over Others And Would Be Arbitrary and Unworkable.

A standing inquiry focusing on the existence of particular religious beliefs, or whether the plaintiff is part of an arguably "excluded" religious minority, would impose an arbitrary rule that would threaten to disenfranchise those with genuine injury from seeking recourse in the federal courts.

The Establishment Clause protects against not only government favoritism of a particular religion, but the elevation of religion over irreligion generally. *See, e.g.*, *Van Orden*, 545 U.S. at 710 ("We have repeatedly affirmed that neither a State nor the Federal Government can constitutionally pass laws or impose requirements which aid all religions as against non-believers." (quotation omitted)); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."). Permitting only the religious to object to a religious display cannot be squared with the substantive protection against the government favoring *all* religion that the Clause affords.

Indeed, granting standing only to those whose objections are deemed "religious" or "spiritual" would improperly establish a hierarchy of belief structures, under which only those who espouse certain types of beliefs are permitted access to the courts. Other beliefs, equally deeply held, would be relegated to second-class status. This is of particular concern to *amicus*, an organization that embraces a scientific world-view referred to as "scientific naturalism" or

"philosophical naturalism." This naturalistic outlook seeks to provide a rational, ethical alternative to the current religious systems of belief. *Amicus* is concerned that the government's rule would deny it a voice, despite the fact that the beliefs held by *amicus* regarding the separation of Church and State are equally as sincere as any rooted in conventional religious belief.

Not only would the government's proposed rule threaten to marginalize certain beliefs, but it also would require courts to venture into the philosophical quandary of trying to separate "spiritual" from merely "philosophical" beliefs. For example, in dicta, this Court once characterized secular humanism as a "religion" that does not teach "what would generally be considered a belief in the existance of God." *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). *Amicus* would take issue with the characterization of secular humanism as a religion and suggests that it is more appropriately viewed as an alternative to religion. *See Random House Webster's Unabridged Dictionary* 1730 (2d ed. 2001) (defining secular humanism as "any set of beliefs that promotes human values without specific allusion to religious doctrines"); *see also Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000) ("The Court's statement in *Torcaso* does not stand for the proposition that humanism . . . amounts to a religion under the First Amendment. The Court offered no test for determining what system of beliefs qualified as a 'religion' under the First Amendment."); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) ("[N]either the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes."). How, then, would the Court treat a secular humanist plaintiff who objects to a government-sponsored religious display?

The Court has recognized the difficulties in seeking to define religion. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[A] determination of what is a 'religious' belief or practice . . . present[s] a most delicate question."); *see also Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment."); *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981) ("[D]efining religious belief is often quite difficult."); Laurence H. Tribe, *American Constitutional Law* 1181 (2d ed. 1988) ("The most common approach to defining religion is to draw analogies to generally accepted religions. When such analogies focus on the externalities of a belief system or organization, they unduly constrain the concept of religion.").[5]

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[5] In the few instances when this Court has opined on what constitutes a religious belief, it has tried to avoid this difficulty by expansively defining religion. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 176 (1965) ("The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly [holding "religious" beliefs]."); *Welsh v. United States*, 398 U.S. 333, 340 (1970) ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual a place parallel to that filled by . . . God in traditionally religious persons." (quotation omitted)). But this sort of test would effectively base standing on the intensity or passion of the litigant's beliefs, which is no easier to measure and has already been repudiated as an inappropriate gauge of standing. *See Valley Forge*, 454 U.S. at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

Theologians, philosophers, and sociologists also have acknowledged the difficulty in describing what constitutes a religious belief. *See, e.g.*, William P. Alston, *Religion*, *in* 7 *The Encyclopedia of Philosophy* 140, 141 (Paul Edwards ed., 1967) ("One could hardly expect to get an adequate statement of the nature of so complex a phenomenon as religion, essentially involving, as it does, all these forms of human activity by restricting oneself to belief, feeling, ritual, or moral attitude alone."); Paul Tillich, *Christianity and the Encounter of the World Religions* 292 (1963) ("[T]he term religion is open both to limiting and to enlarging definitions . . . one can even take the further step of subsuming under religion those secular movements which show decisive characteristics of the religions proper, although they are at the same time profoundly different."); William James, *The Varieties of Religious Experience* 26 (1920) ("[T]he very fact that [definitions of religion] are so many and so different from one another is enough to prove that the word 'religion' cannot stand for any single principle or essence, but is rather a collective name."); Max Weber, *The Sociology of Religion* 1 (1922) ("To define 'religion,' to say what it *is*, is not possible at the start of a presentation such as this . . . [t]he external courses of religious behavior are so diverse that an understanding of this behavior can only be achieved from the viewpoint of the subjective experiences, ideas, and purposes of the individuals concerned.").[6]

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[6] Legal commentators have similarly noted the complexities involved in attempting a definition of religion. *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831, 1905 (2009) ("Religion is a category that is hard to delimit."); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 762 (1984) ("Religion is a highly complex concept . . . and agreement upon a settled account of what makes something religious has been elusive."); George C. Freeman, *The Misguided Search for the Constitutional Definition of 'Religion'*, 71 Geo.

Plaintiffs should not be required to prove that their objections are religious under a standard so inherently arbitrary and nebulous. *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); *see also, e.g., Gillette v. United States*, 401 U.S. 437, 457 (1971) (noting the dangers of "state involvement in determining the character of persons' beliefs and affiliations" (quotations omitted)); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449-50 (1969) (holding that courts should not resolve "controversies over religious doctrine and practice"). The Court should decline the government's invitation to base standing on whether an objection is "spiritual" rather than a "value or policy disagreement[]." Pet'rs Br. at 14.

II. THE COURT SHOULD NOT ADOPT ANY RULE OR PRESUMPTION FOR LAND TRANSFERS, BUT SHOULD LOOK AT ALL THE CIRCUMSTANCES TO DETERMINE WHETHER A LAND TRANSFER GENUINELY DISTANCES THE RELIGIOUS DISPLAY FROM GOVERNMENT SPONSORSHIP.

The Court should adopt neither an absolute rule nor a special presumption that the transfer of land to a private party separates the government from a religious display so as to end any Establishment Clause violation. It is not true that observers will necessarily attribute speech to a private party who owns the land. Pet'rs Br. at 23. Just as the government arranging for a private party to be the nominal speaker does not insulate government-sponsored prayer from challenge,

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L.J. 1519, 1565 (1983) ("There simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else.").

see Santa Fe, 530 U.S. at 305, conveying title to a private landowner does not necessarily avoid actual or perceived government sponsorship of a religious display.

Fashioning a new presumption that a land transfer will cure a constitutional violation would encourage the sort of peculiar gerrymandering accomplished by the statute at issue here, as government actors devise increasingly ingenuous schemes to create the appearance of compliance with the Establishment Clause.[7] Rather than applying a rote presumption, the Court should look to all of the relevant circumstances, including the history and context of the government action, to determine whether transferring the title of government-owned land to a private entity reflects a meaningful and genuine separation of the display from the government's imprimatur. *See id.* at 305 (holding that the government "failed to divorce itself from the religious content" of invocations by devising a scheme for the prayer to be led by a student speaker); *McCreary County v. ACLU*, 545 U.S. 844, 846 ("[S]ecular purpose [must] be genuine, not a sham, and not merely secondary to a religious objective.").

A holistic assessment of the facts and circumstances concerning a purportedly curative land transfer is in keeping with the Court's longstanding method of analyzing compliance with the Establishment Clause. Although the contours of the test applied in Establishment Clause cases have varied, the Court has repeatedly stated that the Establishment Clause analysis must be nuanced and fact-specific, not a mechanical exercise. When reviewing the validity of a statute challenged under the Establishment

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[7] Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121, 117 Stat. 1100 [hereinafter "2004 Act"].

Clause, courts "not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances.'" *Santa Fe*, 530 U.S. at 315 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984)) (O'Connor, J., concurring)). This inquiry includes an awareness of the "'history and context of the community and forum.'" *Id.* at 317 (quoting *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment)).

As Justice Breyer's concurring opinion stated in *Van Orden*, "I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." 545 U.S. at 700 (citations omitted) (Breyer, J., concurring); *see also McCreary*, 545 U.S. at 859 n. 10 ("Establishment Clause doctrine lacks the comfort of categorical absolutes."). Likewise, the plurality in *Van Orden* grounded its inquiry on examination of "the nature of the monument," as well as by a historical inquiry into the symbol's meaning and significance. *See Van Orden*, 545 U.S. at 686.

Establishing a presumption that transferring title to the land immediately surrounding a display will end attribution of the display to the government is also inconsistent with the Court's recent decision in *Pleasant Grove City v. Summum*, which concluded that donated displays in public parks are strongly identified with the

government. 129 S. Ct. 1125, 1130 (2009). The Court held in *Summum* that "the placement of a permanent monument in a public park is best viewed as a form of government speech." *Id.* at 1129. That is because "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land." *Id.* at 1133. When the government chooses to allow particular monuments in a public park, the Court stated, they "are meant to convey and have the effect of conveying a government message." *Id.* at 1134. The association between the government and monuments displayed in public parks was so strong that, the Court held, it was unnecessary for jurisdictions formally to proclaim monuments to be their own expressive vehicles for the monuments to be considered government speech; simply putting the monuments on display "provided a more dramatic form of adoption" than a formal statement of endorsement. *Id.*[8] Presuming that a land transfer so easily and abruptly ends the governmental endorsement of a display standing for decades on government land in a national preserve would be contrary to *Summum*.

III. THE LAND TRANSFER DOES NOT DISTANCE THE GOVERNMENT FROM THE RELIGIOUS DISPLAY IN THIS CASE.

The government's transfer of title of the immediate parcel of land where the cross sits does not provide any meaningful distance from governmental endorsement of

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[8] Although the Court found a formal proclamation unnecessary to create a link between the govnment and a donated display, in this case there is also formal legislation adopting and embracing the monument as promoting a government message. *See* Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278 [hereinafter "2002 Act"] (designating Mojave Cross as a national memorial).

religion and does not transform maintenance of the cross into private action. To the contrary, the purpose and effect of the land transfer legislation are to ensure that the cross continues to stand in the midst of public parkland.

The argument that the 2004 Act does not represent a governmental effort to maintain the cross in the Mojave Preserve rests on the slimmest of reeds: that the reversionary clause of the 2004 Act "requires only that the VFW maintain the conveyed property as '*a*' war memorial, not '*the*' war memorial [i.e., the cross] that had been designated in the 2002 Act." Pet'rs Br. at 33 (emphasis added) (citing 2004 Act § 8121(e) ("The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I."')). The government argues that because of this wording, "once the property is conveyed, how to commemorate World War I veterans will be up to the VFW," thereby shifting the religious message conveyed by the cross to the VFW, a private party. *Id.* The government's argument that private choice of the VFW and not government action is responsible for the continued maintenance of the cross is not credible under the circumstances. *Cf. McCreary*, 545 U.S. at 864 (secular purpose of government action "has to be genuine, not a sham"); *Santa Fe*, 530 U.S. at 308; (governmental representations about purpose of its actions are "entitled to some deference [b]ut it is . . . the duty of the courts to distinguish a sham secular purpose from a sincere one." (quotations omitted)).

First, the government's interpretation of the 2004 Act as leaving to the VFW the ability to erect some other monument without triggering reversion is contrary to the plain reading of the statute. Section 8121(a) transfers a

specific war memorial -- namely, the white cross designated as a national memorial by the 2002 Act. *See* 2004 Act § 8121(a) ("[T]he Secretary . . . shall convey . . . a parcel of real property consisting of approximately one acre . . . *and designated [by the 2002 Act] as a national memorial.*" (emphasis added)). Read in conjunction with subsection (a), the reversionary clause in subsection (e) refers to the same war memorial as specifically referenced in subsection (a) of the 2004 Act. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a holistic endeavor." (citations omitted)); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (court has a "duty to construe statutes, not isolated provisions").

Consistent with this reading, Representative Jerry Lewis, sponsor of the 2004 Act, characterized the statute's purpose as ensuring that the cross is maintained. Representative Lewis issued a press release shortly after the Ninth Circuit's ruling now subject to review emphasizing the designation by Congress of the "Mojave Cross" as a national memorial (the result of legislation which he also sponsored) and characterizing the 2004 Act as "strong support by Congress . . . for *this historic memorial.*" *See* Press Release, Jerry Lewis, *Ninth Circuit Erred in Attacking Mojave Cross Veterans Memorial, Lewis Believes* (Sept. 7, 2007), *available at* http://www.house.gov/jerrylewis/september72007.html (last visited July 30, 2009). Representative Lewis would not tout the statute as showing "strong support" for the specific Mojave Cross memorial if the 2004 Act was intended to let the new nominal owners install a different monument. The government's contrary interpretation of the statute is a *post hoc* effort to re-cast the legislation as leaving the decision whether to maintain the cross in private hands.

Second, Congress transferred the land to the same group that erected the cross originally. Inferring the intent of ceding the land to that particular party is easy. Its purpose was to ensure that the new landowner would continue to maintain the cross. No "private decision" creates a genuine circuit-breaker between the government and the religious message conveyed by the cross under these circumstances. *Compare Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality) ("[I]f numerous private choices, *rather than the single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."), *with Santa Fe*, 530 U.S. at 305 (rejecting argument that student-led invocations were constitutional because under "the realities of the situation" the student choice was not a private "circuit-breaker"). It was the government's choice to transfer the land to precisely the party most likely to keep the cross intact; so the fact that the cross remains standing is attributable to the government's action.

Had Congress intended for any decision to maintain or take down the cross genuinely to be a private decision, it could (for example) have sold the land through a competitive bidding process. The government, however, chose not to solicit bids by others, instead choosing to transfer the land to the group which it must have known would maintain the cross. Nor did Congress choose to erect in place of the cross a secular war memorial, an action that would have fulfilled its purported goal of continuing to maintain "a" war memorial without endorsing any religious message.

Third, the government's professed rationale for transferring the land reveals that it always intended for the cross to be maintained. Petitioners' brief acknowledges that

the 2004 Act and the statutes that preceded it had as their purpose "the preservation of a *longstanding* memorial," not some new memorial erected in place of the cross. Pet'rs Br. at 32 (emphasis added). All of the legislation enacted by Congress on this issue was, in the government's conception, of a piece: to "avoid social conflict" that would be caused by taking down the cross. *Id.* at 28-29 ("[R]ecognizing the probability that the Park Service's proposed action [of removing the cross] would engender social conflict, Congress intervened first by preventing the use of federal funds to remove the cross, then by designating the cross as a national memorial, and finally by transferring the site to the VFW."). Even assuming the government's ultimate motive was to avoid social conflict rather than to promote religion *per se*, its immediate and expressed goal was to ensure that the cross remained standing. The government cannot credibly argue that the 2004 Act created a genuine private choice whether or not to keep the cross intact when it admittedly transferred the cross to avoid the social conflict that would be caused by the cross's removal.

In any event, avoiding "social conflict" is not a valid justification for the government to support maintenance of a religious symbol. Permitting the Ten Commandments display to remain in the Kentucky courthouse might have caused less consternation among those Kentuckians who supported the display, but that did not make it constitutional to leave it displayed in the courthouse. *See McCreary*, 545 U.S. at 881. Nor could a public school teacher continue to lead students in morning prayers simply because most of the parents in the district would complain if the prayers were forbidden. *See Schempp*, 374 U.S. at 226-27. Permitting government endorsement of religion in the name of avoiding "social conflict" would surrender core constitutional protections to the majoritarian will.

Finally, Congress has never revoked its specific designation of the cross as a national memorial. *See* 2002 Act § 8137(a) ("The five-foot-tall white cross first erected by the Veterans of Foreign Wars . . . is hereby designated as a national memorial."). If the government wished to end its endorsement of the religious message that the cross conveys, it would have repealed the legislation. *See McCreary*, 545 U.S. at 871-72 (that resolutions evidencing religious purpose "were not repealed or otherwise repudiated" was evidence of continued improper purpose).

In sum, the government's actions here illustrate the dangers of establishing any rule or presumption that land transfers cure Establishment Clause violations arising from religious displays. The Court should not fashion a rule that would breed similar artifice.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Respondent's standing as proper. This Court should also hold that, considering all of the circumstances, the land transfer at issue does not end the Establishment Clause violation.

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Dated: August 3, 2009

AMICUS CURIAE BRIEF

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FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

FRANK BUONO,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CHRISTIAN LEGAL SOCIETY AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Christian Legal Society (CLS) is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with neither rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches

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[*] The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

and other religious ministries. NAE believes that religious freedom is a gift of God, and is vital to limiting the government which is our American constitutional republic.

SUMMARY OF ARGUMENT

In order to prevent standing by contrivance in "unwanted exposure" cases, this Court's precedents evince the requirements that a plaintiff's status naturally result in he or she being personally exposed to offensive religious expression by the government, or forced to assume special burdens to avoid such exposure. As *amici* will show, Frank Buono lacks that status.

In 1934, the Veterans of Foreign Wars erected a Latin cross in a location known as Sunrise Rock in the Mojave Desert in southeastern California.[1] The cross is a memorial to members of the armed forces who died in World War I. In 1994, the site where the cross is located became part of the Mojave National Preserve, which is administered by the National Park Service (NPS), United States Department of the Interior. The Preserve consists of 1.6 million acres of federal land in the Mojave Desert, with 86,600 acres of private land within its boundaries.

Respondent, Frank Buono, filed this lawsuit in March 2001 seeking a declaration that the Latin cross on government land violated the Establishment Clause, as well as an injunction ordering the cross's permanent removal. At the time suit was filed, Buono was a retired employee of the NPS residing in Oregon. He has retained an active interest in the Preserve and visits the Preserve two

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[1] The facts recited in this Summary of Argument are from uncontested findings of the district court. *See Buono v. Norton*, 212 F.Supp.2d 1202, 1204-07 (C.D. Cal. 2002).

to four times per year. When Buono was an employee of the NPS, he was assigned to the Preserve from January 22, 1995, to December 10, 1995. It was during this period of employment that Buono learned of the cross and visited the site at Sunrise Rock. He retired twelve years ago in 1997.

Buono is a Roman Catholic and testified that he does not find a Latin cross religiously or spiritually offensive. Rather, Buono maintains that he is offended because the NPS fails to remove the Latin cross, a symbol of Christianity, from government land. When visiting the Preserve, Buono has taken to avoiding Sunrise Rock so as not to be exposed to the cross, such avoidance being an added burden because it means not using Cima Road. One can see the Latin cross from where Cima Road passes by Sunrise Rock. Cima Road is the most convenient road for accessing certain areas within the Preserve.

The lower federal courts held that Buono has personalized "injury in fact" such that he has standing to bring this claim alleging a continuing violation of the Establishment Clause. The federal district court wrote that although Buono does not find a Latin cross offensive to his Catholic faith, he "stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land." 212 F.Supp.2d at 1207. First quoting with approval this passage by the district court, the Ninth Circuit went on to observe that:

> Buono is, in other words, unable to "freely us[e]" the area of the Preserve

> around the cross because of the government's allegedly unconstitutional actions. . . . We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact. . . . Such inhibition constitutes "personal injury suffered . . . *as a consequence* of the alleged constitutional error," beyond simply "the psychological consequence presumably produced by observation of conduct with which one disagrees."

Buono v. Norton, 371 F.3d 543, 547 (9th Cir. 2004) (citations omitted).[2]

This is error. Buono seeks injunctive relief from an ongoing injury, not damages for past harm. Because Buono claims no "religious or spiritual" injury as a result of unwanted exposure to the Latin cross, that leaves Buono's alleged ongoing "injury in fact" as being either: (1) unwanted exposure to the cross because of the government's failure to meet its duty of church-state separation which requires, in his view, removal of the cross from government land;

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[2] Subsequent proceedings involving the merits of the Establishment Clause claim appear at *Buono v. Norton*, 364 F.Supp.2d 1175 (C.D. Cal. 2005), and *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008). The government did not continue to challenge Buono's standing in these later proceedings because the district and circuit courts had already ruled adversely on the matter. The government did not thereby waive its objection to Buono's standing. Standing is derived from the "case" or "controversy" requirement in Article III. That provision defines the subject matter jurisdiction of the federal courts. Because it is structural rather than rights-based, objections to a federal court's lack of subject matter jurisdiction can never be waived. *See* Fed. R. Civ. P. 12(h)(3).

or (2) restricted use of Cima Road to avoid being re-exposed every time he observes that the government has failed to remove the cross. The first allegation, however, is a claim of "injury in fact" when a strict separationist is offended by a church-state violation when observing a religious symbol on government land. That is like the claimed "injury" discussed and rejected in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982) (holding plaintiffs lack standing to challenge government plans to give surplus land to religious college). And the second allegation of "injury in fact" is one of restricted use of Cima Road *because of* Buono's offense that the government has failed in its duty of church-state separation by not removing the cross. Thus the second alleged harm (avoiding offense) logically collapses into the first (being offended).

With respect to the alleged church-state violation observed by the complaining parties in *Valley Forge*, the Court held:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. . . . It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but

> standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Id. at 485-86. Buono tries to circumvent this passage in *Valley Forge* by asserting he does suffer a personal injury in that he does not use Cima Road to avoid re-exposure to the Latin cross.

That is not enough for Buono to secure standing, as the *Valley Forge* Court went to explain. The Court distinguished the facts before it in *Valley Forge* from the parents and their school-age children exposed to unwanted prayer and devotional Bible reading in *Abington School District v. Schempp*, 374 U.S. 203 (1963), as follows:

> "The parties [in *Schempp*] are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed." . . . The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* [*v. Board of Education*, 342 U.S. 429 (1952),] demonstrated, that is insufficient — but because impressionable schoolchildren were subject to unwelcome religious exercises or were forced to assume special burdens to avoid them. [Americans United, *et al.*] have alleged no comparable injury.

Valley Forge, 454 U.S. at 487 n. 22. This Court's "unwanted exposure" precedents require that a plaintiff's status naturally result in he or she being personally exposed to offensive religious expression by the government, or forced to assume special burdens to avoid such exposure. In *Schempp*, the claimants' natural circumstance of school attendance was such that the students were brought into personal and regular exposure to the unwelcomed prayer and biblical devotions, or the students were forced to assume special burdens to avoid them.

This sensible rule has developed to prevent standing by contrivance. Requiring "injury" so as to have standing to sue can easily be manufactured if all one had to do is travel several miles to the site of a religious symbol or other expression of the government's and personally observe it on one occasion. Thus, it makes sense that a plaintiff's status (e.g., student, legislator, local municipal citizen) must naturally bring him or her into personal and regular contact with the offending expression.

Buono's ongoing claim is that he will suffer an offense cognizable under the Establishment Clause if he travels to observe the cross which he deems a church-state violation, or he is "forced to assume special burdens to avoid" being exposed to the church-state violation. Buono's status does not naturally subject him to personal exposure to the cross. Buono's request for injunctive relief means that he necessarily avers an ongoing violation of the Establishment Clause. But he is a retired employee of the NPS residing in Oregon. It is not as if Buono

is currently employed by the NPS and job duties require that he travel Cima Road past Sunrise Rock. Buono's path to standing is foreclosed by *Valley Forge*, as well as that Court's reliance on *Schempp* and *Doremus*.[3]

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[3] Buono also avers that he is offended that other private groups, religious and nonreligious, are not permitted by the NPS to use the site at Sunrise Rock to display their symbols and other expression. *See Buono v. Norton*, 212 F.Supp.2d at 1207 ("Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols that choose."). First, such an averment states a free-speech claim that equal access is being denied to a limited public forum, not a claim under the Establishment Clause about religious speech attributable to the government. *Cf. City of Pleasant Grove, Utah v. Summum*, 129 S. Ct. 1125 (2009). Second, Buono lacks third-party standing to raise the legal claims of others.

ARGUMENT

I. In Cases Challenging Religious Symbols or Other Expression Attributable to the Government, Reduced-Rigor Standing Has Been Permitted Only Where the Offended Plaintiff's Status Naturally Results In Personal Exposure to the Unwanted Religious Expression or the Plaintiff is Forced to Assume Special Burdens to Avoid Such Exposure.

There is a very close connection between "injury in fact" for purposes of standing and damages (or "harm") as a necessary element of every claim under the Establishment Clause and for which plaintiff seeks a remedy. Indeed, they usually have been treated as one and the same by this Court. Therefore, Question Presented No. 1 in this case[4] puts at issue a crucial element for stating a claim under this Court's modern Establishment Clause.[5]

As with taxpayer standing (discussed in Point II, *infra*), the Supreme Court's "unwanted exposure" cases under the Establishment Clause have resulted in reduced-rigor rules with respect to the "injury in fact" required for standing. However, this reduction

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[4] Question Presented No. 1 reads: "Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols."

[5] The decision in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947), marks the beginning of this Court's modern era with respect to church-state relations. *See, infra*, note 16 (additional discussion of *Everson*).

in the rigor with which "injury" is assessed for purposes of standing is a narrow exception[6]—same as it is with taxpayer standing.[7] Reduced rigor in the required "injury" has been permitted only in cases challenging religious symbols or other expression attributable to the government. And only then does the lesser "injury" suffice where the plaintiff's status naturally results in personal exposure to the unwanted religious expression, or the plaintiff is forced to assume a special burden to avoid re-exposure.

The Court's cases of "unwanted exposure" to government religious speech are not great in number—just sixteen. Moreover, in nearly all of these cases—just two exceptions—the plaintiff's standing was not challenged by the government and thus was not an issue argued by counsel and decided by the Court. This second line of cases, therefore, has less to teach us with respect to what this Court minimally requires of a plaintiff to have the "injury in fact" required for standing to bring a case of "unwanted exposure" to religious speech by the government. In chronological order the cases are as follows:

1. *McCollum v. Board of Education*, 333 U.S. 203 (1948), invalidated a local school district's program

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[6] It is a narrow exception because federal courts are of limited jurisdiction per U.S. Const. Art. III, § 2, cl. 1. And, when Article III jurisdiction is pushed to its outer reaches, separation of powers is necessarily implicated.

[7] *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 127 S. Ct. 2553, 2564 (2007) (plurality opinion) ("In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing.").

allowing nearby churches to hold optional religion classes in public school classrooms during regular school hours. The plaintiff was a resident and taxpayer of the local school district, and "a parent whose child was then enrolled in the Champaign public schools." *Id.* at 205. Also relevant to plaintiff's subjection to the program to have standing to challenge it, the Court said:

> The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.

Id. at 209. The government's challenge to plaintiff's standing was rejected without analysis in a single sentence: "A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. *Coleman v. Miller*, 307 U.S. 433, 443, 445, 464." *Id.* at 206 (*Coleman* addressed the jurisdiction of the Court to review actions by state legislators said to have ratified a proposed amendment to the federal Constitution.). Accordingly, we do not have an explanation by this Court with respect to what "injury in fact" is required to file a case of "unwanted exposure" to religious expression by the government.

2. *Doremus v. Board of Education*, 342 U.S. 429 (1952), challenged teacher-led devotional Bible

reading in New Jersey public schools. The Court did not reach the merits. Some plaintiffs, claiming status as state taxpayers, were dismissed for lack of standing. And a parent of a student subjected to the religious exercise had sued, but his child had subsequently graduated and thus his claim was moot. Accordingly, the case is not an instance where this Court ruled on the "injury in fact" required of a plaintiff claiming "unwanted exposure" to religious speech attributable to the government.

3. *Engel v. Vitale*, 370 U.S. 421 (1962), was a challenge to a statewide program of daily classroom prayer in New York public schools. The plaintiffs were "parents of ten pupils . . . insisting that use of this official prayer in the public schools was contrary to the beliefs, religion, or religious practices of both themselves and their children." *Id.* at 423. The government did not challenge the standing of the plaintiffs. That is surprising because the objecting parents and their school-age children could obtain an opt-out from the prayer exercise. *Id.* at 423 n. 2. So once again the case did not present an instance where this Court determined the "injury in fact" required of a plaintiff claiming "unwanted exposure" to religious speech attributable to the government.

Nevertheless, the fact that the "observance on the part of the students is voluntary" did not escape the Court's notice. *Id.* at 430. The prayer being voluntary would make a difference under the Free Exercise Clause, explained the Court, where coercion is an essential element of the prima facie claim. But with respect to the Establishment Clause, coercion or compulsory exposure to the prayer need not be

shown. *Id.* This is because the object of the modern Establishment Clause is to separate church and state so as to prevent injury to either or both, as opposed to being a rights-based claim with its object being to prohibit individual religious harm. *Id.* at 430-32. In Point II, *infra*, *amici* show how this relates to standing, and thus why the modern Court has fashioned "reduced rigor" standing rules only under the Establishment Clause.

4. *Abington School District v. Schempp*, 374 U.S. 203 (1963), involved consolidated cases from Philadelphia and Baltimore, both challenging daily classroom prayer and devotional Bible reading in public schools. In both instances, the religious exercises were optional. *Id.* at 224-25. In the Philadelphia case, the plaintiffs were:

> Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they . . . regularly attend religious services. . . . The [two] children attend the Abington Senior High School, which is a public school operated by appellant district.

Id. at 206. In addition, "Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible 'which were contrary to the religious beliefs which they held and to their familial teaching.'" *Id.* at 208.

In the Baltimore case, the plaintiffs were "Mrs. Madalyn Murray and her son, William J. Murray III, . . . both professed atheists." *Id.* at 211. In addition, the "petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights 'in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority . . . .'" *Id.* at 212.

The lack of plaintiffs' standing to challenge the religious practices under the Establishment Clause was raised as an issue by the government. *Id.* at 224 n. 9. The Court reasoned in footnote 9 that the plaintiffs had standing as follows:

> [T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedom are infringed. . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

Standing under the modern Establishment Clause is not only different, but the need for "injury in fact" is of lesser rigor. That much is clear. Footnote 9 cites as authority *McGowan v. Maryland*, 366 U.S. 420

(1961), *Engel*, and *Doremus*, but as we have seen in none of those cases did the government challenge the plaintiffs' standing to bring an "unwanted exposure" claim.

As in *Engel*, the *Schempp* Court explained its lack of concern that plaintiffs did not prove they were victims of the government's compulsion or coercion. Coercion is an element of a Free Exercise Clause claim which is rights-based, but compulsion is not required to state a claim under the Establishment Clause. *Id.* at 221, 223. This is because the Establishment Clause is about policing the boundary between church and state. "[T]he Court found that the 'first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.'" *Id.* at 221. In Point II, *infra*, *amici* show how this relates to standing, and thus why the modern Court has fashioned "reduced rigor" standing rules only under the Establishment Clause.

5. *Chamberlin v. Dade County Board of Public Instruction*, 377 U.S. 402 (1964) (per curiam), citing *Schempp*, summarily struck down prayer and devotional Bible reading in the Dade County, Florida public school district. The plaintiffs were parents of school-aged children enrolled in junior high and elementary schools in Dade County.[8] The plaintiffs' standing to raise an "unwanted exposure" claim was not challenged by the government in the U.S.

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[8] *See Chamberlin v. Dade Cty. Bd. of Pub. Instruction*, 160 So.2d 97, 98 (Fla. 1964).

Supreme Court, and thus we have no guidance on the needed "injury" from this Court.

6. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), struck down a state law requiring the posting of the Ten Commandments in all public school classrooms. Plaintiffs described themselves "as a Quaker, a Unitarian, a non-believer, a mother of school age children and public school teacher, two children of compulsory school age attending public schools, a Jewish Rabbi, and as taxpayers."[9] The plaintiffs' standing to raise an "unwanted exposure" claim was not challenged by the government before the U.S. Supreme Court, and thus we have no guidance on the matter from this Court.

7. *Marsh v. Chambers*, 463 U.S. 783 (1983), upheld a state legislative practice of hiring a chaplain to offer a prayer at the beginning of each day when the legislature is in session. The plaintiff was simply described as "a member of the Nebraska Legislature and a taxpayer of Nebraska." *Id.* at 785. The Court also noted that the plaintiff "claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure." *Id.* at 792. Although the government had challenged plaintiff's standing in the circuit court, *id.* at 785, it did not again press the issue before the U.S. Supreme Court. *Id.* at 786 n. 4. Although conceded by the state, the Supreme Court nevertheless volunteered the following: "[W]e agree that Chambers, as a member of the legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert the claim." *Id.*

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[9] *See Stone v. Graham*, 599 S.W.2d 157, 159 (Ky. 1980).

Thus one holding status as a legislator who is regularly in the legislative chamber when the offending prayer takes place is sufficient "injury in fact" to have standing in this "unwanted exposure" case.

8. *Lynch v. Donnelly*, 465 U.S. 668 (1984), upheld a municipal practice of displaying a nativity scene of Mary, Joseph, and the Christ child as part of a larger Christmas holiday scene in a park. The display was located in a private park in the heart of the shopping district. *Id.* at 671. The plaintiffs were described as Pawtucket, Rhode Island "residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself." *Id.* at 671. The Court's majority opinion does not discuss standing, thus it appears the government did not challenge plaintiffs' claimed "unwanted exposure" injury giving rise to standing.

In a now famous concurring opinion, Justice O'Connor first stated her "endorsement or disapproval test." Her test identifies an injury that is personal to certain plaintiffs that the Establishment Clause is to prevent, namely that the Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687. Justice O'Connor goes on with respect to the nature of the injury:

> **One** is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access

> to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The **second** and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id. at 687-88 (emphasis added). A violation of the test always results in a plaintiff's "religious or spiritual" injury because the test is contingent on "adherence [or nonadherence] to a religion." This "endorsement or disapproval" test has possibilities for identifying that personal religious injury that naturally flows from one's status as local citizen when the church-state matter at issue is "unwanted exposure" to a government's religious expression. But the injury must be religious or spiritual, unlike that claimed by Buono. That said, it is not clear the extent to which a majority of this Court embraces Justice O'Connor's test. The endorsement test would limit "unwanted exposure" standing to instances where there is religious injury. That is contrary to most of the Court's array of 16 "unwanted exposure" cases collected here. Accordingly, *amici* do not support limiting "unwanted exposure" standing to instances of religious injury.

9. *Wallace v. Jaffree*, 472 U.S. 38 (1985), struck down a state law requiring that public schools begin the day with a moment of silence by students for prayer or meditation. The law was found to have a religious purpose. *Id.* at 56-60. The plaintiff challenging the law was a parent who sued on behalf of "three of his minor children; two of them were second-grade students and the third was then in kindergarten." *Id.* at 42. Plaintiff's standing to challenge the state law was not raised by the government. So once again we do not have the benefit of the Court's discussion of what minimal "injury" is required in an "unwanted exposure" claim objecting to religious speech attributable to the government.

10. *Edwards v. Aguillard*, 482 U.S. 578 (1987), struck down a state law requiring public schools to teach creationism whenever evolution is taught. The law was found to have a religious purpose. *Id.* at 586-94. The plaintiffs challenging the law "included parents of children attending Louisiana public schools, Louisiana teachers, and religious leaders." *Id.* at 581. The Court went on to observe:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and

> their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

Id. at 584. Thus the "harm" to plaintiffs' school-age children was the natural consequences of their status as students in Louisiana schools.

Once again there was no challenge by the government in this Court to plaintiffs' standing to call into question the state law. So we can only infer the "injury" needed for standing in a case of "unwanted exposure" to government religious speech.

11. *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (plurality opinion in part), involved challenges to two local governmental displays during the December holiday season. The Court struck down a nativity scene inside the county courthouse, and upheld an outdoor display of a Menorah, Christmas tree, and liberty banner at a different location jointly operated by the city and county. The plaintiffs challenging both displays were "the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents" of the city and county. *Id.* at 587. Once again the government did not challenge the plaintiffs' standing before this Court.

12. *Lee v. Weisman*, 505 U.S. 577 (1992), struck down the practice of invited clergy offering prayers at public school commencement ceremonies. Attendance at the ceremony was voluntary, and no penalty attached to a student who did not attend. *Id.* at 583. The plaintiffs challenging the practice were "Daniel Weisman, in his individual capacity as a Providence taxpayer and as [father] of Deborah," a student now graduated from the middle school, and enrolled in the high school where a similar prayer arrangement was conducted at its commencement. *Id.* at 584. Plaintiffs' standing was discussed. The Court said:

> We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

Id. Once again the voluntary nature of the ceremony—hence lack of compulsion—did not make a difference as long as the claim is brought under the Establishment Clause.

13. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), struck down a public school process whereby a student is elected to offer words of inspiration (with prayer as a likely choice) over the loudspeaker system before high school football

games. The plaintiffs challenging the practice were "two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic." *Id.* at 294. The government did not challenge the standing of the plaintiffs to bring their claim under the Establishment Clause.

14. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), concerned a plaintiff who was denied standing to challenge the words "under God" in the Pledge of Allegiance recited by public school students, including his daughter, at the beginning of each school day. Although the pledge was optional, both the daughter and her mother, who held legal custody, wished to have the daughter recite the pledge. Standing was denied because the plaintiff, although the student's father, was a noncustodial parent having no say in the matter. Accordingly, *Newdow* does not discuss the "injury in fact" needed for standing by a plaintiff complaining of "unwanted exposure" to religious expression attributable to the government.

15. *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion), upheld the constitutionality of a Ten Commandments monument, one of several monuments on display on the grounds outside the State of Texas Capitol. The plaintiff challenging the monument was described as follows:

> Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that,

> since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.
> Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued . . . .

Id. at 682. As one trained as a lawyer but without a law office or library of his own, as well as a citizen of Austin, it was natural that he took advantage of the free use of the law library near the Capitol. The government did not challenge Van Orden's standing before this Court.

16. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), struck down the Ten Commandments placed in display cases, along with other historical documents, in two county courthouses in the Commonwealth of Kentucky. The plaintiffs challenging both displays were all too briefly described as "American Civil Liberties Union of Kentucky et al." *Id.* at 852. The Court also explained that in both counties "the hallway display was 'readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to local taxes, and to register to vote.'" *Id.* (citation omitted). A lower court opinion explains that in addition to the ACLU of Kentucky, the

plaintiffs were Lawrence Durham and Paul Lee.[10] From the context it is apparent that Durham and Lee are residents of the county. The lower court said the ACLU had organizational standing because it "has members in Pulaski County who would have standing for the same reason that the named plaintiffs have standing."[11] The government suggested in its briefs that "the Ten Commandments were posted in order to teach Pulaski County residents about American religious history and the foundations of the modern state."[12] Although before the district court the government challenged plaintiffs' standing because they lacked the necessary "injury in fact,"[13] having lost the issue at the trial level the government did not raise the standing question before the Supreme Court. One could infer from *McCreary County* that a county citizen who has to visit the site of the offending religious message in order to do necessary legal transactions with the county government has sufficient personal "unwanted exposure" so as to have "injury in fact" for purposes of standing.

* * *

It is remarkable that in only three out 16 cases has plaintiffs' standing been challenged before the U.S. Supreme Court on the basis that there was no "injury in fact" due to "unwanted exposure" to the government's religious speech. The three cases are *Schempp*, *Marsh*, and *Weisman*. These three cases

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[10] *See ACLU of Kentucky v. Pulaski Cty.*, 96 F.Supp.2d 691 (E.D. Ky. 2000).

[11] *Id.* at 694.

[12] *Id.* at 698.

[13] *Id.* at 694-95.

involve plaintiffs who are parents and their school-age children, and a legislator. The rule to draw from *Schempp*, *Marsh*, and *Weisman*, and to a lesser degree the other 13 cases where lack of standing might have been raised but was not, is that the "injury" required in an "unwanted exposure" case is that the offended plaintiff's status in life must have brought him or her into personal contact with the government's religious symbol or other expression.[14] Following this rule will prevent parties who would contrive their exposure "injury" by going out of their way to travel to the site of a religious symbol and observe it merely to acquire standing. Buono has no such status such that he has "injury in fact" endowing him with a "case" or "controversy" for which he has standing to sue.

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[14] Frequency or regularity of exposure to the offending religious expression attributable to the government in some instances may be evidence that the plaintiff naturally has the status required to have "unwanted exposure" standing. Thus, for example, one would expect that a citizen of a municipality with a holiday Christmas display to have more frequent exposure to the offending Christmas display on the lawn of the city hall, than say the frequency of exposure of one who lives five hundred miles away. Yet regularity of exposure is not a substitute for the needed status because frequency of exposure can easily be contrived. On the other hand, while personal exposure is always required, regularity of the exposure may be quite limited where a plaintiff is mandated by legal duty to incur exposure to the offending religious symbol or other speech. One example of such duty is where plaintiff's job responsibilities require exposure to the offending religious speech. Another example is where plaintiff's duty, albeit not regular, is as a county citizen called as a juror or witness in a lawsuit and the religious symbol must be passed just once or twice as plaintiff enters the courthouse. *See, e.g., Books v. Elkhart Cty.*, 401 F.3d 857, 862 (7th Cir. 2005).

II. THIS COURT HAS PERMITTED REDUCED-RIGOR STANDING IN ONLY TWO INSTANCES: FOR TAXPAYERS AND WHERE THE PLAINTIFF'S STATUS NATURALLY RESULTED IN PERSONAL EXPOSURE TO UNWANTED RELIGIOUS EXPRESSION ATTRIBUTABLE TO THE GOVERNMENT OR THE PLAINTIFF IS FORCED TO ASSUME SPECIAL BURDENS TO AVOID SUCH EXPOSURE.

In circumstances very different than the one before this Court, a claimant under the Establishment Clause can have individualized "injury in fact" that meets all of the normal requirements for standing. These harms run from economic loss, to inability to qualify for public office, to restrictions on academic inquiry.[15] But in each of the six cases set out in the footnote, plaintiffs had conventional "injury in fact" and thus met the usual "case" or "controversy" requirements for standing. That is not so with respect to cases involving

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[15] Consider the department store in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 707 (1985) (increased employment regulation resulting in economic harm), the tavern in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 118 (1982) (denial of a liquor license resulting in economic harm), the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968) (hindrances to academic inquiry resulting in criminal charges and loss of job as "injury"), the forced taking of a theistic oath by a freethinking atheist in *Torcaso v. Watkins*, 367 U.S. 488 (1961) (inability to qualify for public office as "injury"), shuttering one's business on Sunday in *McGowan v. Maryland*, 366 U.S. 420, 422, 430-31 (1961) (economic harm to retail stores and criminal fines imposed on their employees), and closing one's retail store on Sunday in *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 592 (1961) (lost business as economic harm).

"unwanted exposure" to religious symbols or other speech fairly attributable to the government. Only in two types of cases—taxpayer and "unwanted exposure" claims—has this Court applied a reduced-rigor test for "injury in fact" so as to ease the path to reaching the merits of the claim under the Establishment Clause. Why is that so?

The Court's modern view of the Establishment Clause was instituted sixty-two years ago with this Court's decision in *Everson v. Board of Education of the Township of Ewing*.[16] Because both the Free Exercise and Establishment Clauses are pro-religious freedom,[17] the question arose early with

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[16] 330 U.S. 1. Not only did *Everson* incorporate the Establishment Clause making it applicable to state and local governments, but *Everson* looked to the history of disestablishment in the new American states, especially Virginia, for the principles behind the meaning of the Clause. *Id.* at 11-15. *See* Carl H. Esbeck, *The 60th Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J. of Law & Religion 15 (2007-08).

[17] "Just like the First Amendment is pro-freedom of speech and pro-freedom of the press, the First Amendment is also pro-freedom of religion. Now, being pro-freedom of religion is markedly different from being pro-religion. The latter is prohibited by the modern Establishment Clause, thereby maintaining the requisite government neutrality. But the First Amendment is pro-religious freedom. Moreover, this is as true of the Establishment Clause as it is of the Free Exercise Clause. While commonplace to some, others will be surprised to have the Establishment Clause portrayed as pro-religious freedom. This is to say that the separation of church and state, properly conceived, is far more about protecting religious freedom than it is about furthering modernity's project to confine religion." Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W.Va. L. Rev. 359, 360 (2007).

respect to how the two clauses were to be distinguished. The Court's answer came soon in *Engel v. Vitale*[18] and was reaffirmed a year later in *School District of Abington Township v. Schempp.*[19] As the *Engel* Court said:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish any official religion whether those laws operate directly to coerce nonobserving individuals or not.

Id. at 430. The Court goes on to explain that the reason that coercion is not a required element of a no-establishment claim is that the Clause is first and foremost about the separation of church and state. *Id.* at 425-36. Church-state separation is a relationship between two centers of authority. This is not due to any hostility to religion but for the protection of both the freedom of the church and to prevent division within the body politic when government takes sides on explicitly religious questions. Disestablishment deregulated religion, thus protecting both church and state. Individual

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[18] 370 U.S. 421 (1962).

[19] 374 U.S. 203, 221, 223 (1963). *Accord Lee v. Weisman*, 505 U.S. 577 (1992).

liberties are protected by the Clause only as a consequence of keeping these two authorities in right order relative to each other, and sometimes the individual liberties protected are not religious but, e.g., economic, access to public office, or freedom of academic inquiry.[20]

It thus developed in this Court that the Free Exercise Clause was confined to addressing those situations where religious practice or observance had come under state coercion. Without evidence of coercion, either standing was denied (consider the discussion in Point I, *supra*, in *Engel* and *Schempp*) or the free exercise claim failed on the merits.[21] The Free Exercise Clause is thus a rights-based claim; it runs in favor of religious individuals.[22]

The Establishment Clause operates quite differently—all the while retaining its character as pro-religious freedom. The Establishment Clause works to limit the power of government. In that sense, it operates much like a structural clause.[23]

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[20] See the cases collected in note 15, *supra*.

[21] *See Harris v. McRae*, 448 U.S. 297, 320 (1980) (free-exercise claim requires compulsion of religious belief); *Tilton v. Richardson*, 403 U.S. 672, 689 (1973) (plurality opinion) (coercion required to state free-exercise claim); *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968) (same).

[22] Of course, to state a claim that involved coercion with respect to a religious practice did not mean that every such claim would be successful. And with the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), fewer free-exercise claims succeed.

[23] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998). A more summary statement of the evidence that this Court has applied the Establishment Clause as if it were

Many an individual claimant does not need to show personal religious harm to win a claim under the Establishment Clause.[24] Indeed, in two lines of cases the claimant does not need to show personalized injury at all—taxpayers and "unwanted exposure" cases. This came about because—unlike free exercise which is rights-based—the Court's modern Establishment Clause is about separation of church and state. When church and state are not rightly ordered, the harm or damage might be other than religious. As this Court said in *McGowan v. Maryland*, 366 U.S. 420 (1961):

> If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writing of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.

Id. at 430. Such oppression often resulted in injury other than religious harms (*McGowan* was

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structural in nature, as well as how such a view explains not only this Court's special standing rules with respect to no-establishment but other validations as well, *see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. of L. & Politics 445, 453-71 (2002).

[24] *See* the cases collected in note 15, *supra*.

economic), indeed it can result in instances where no one has individualized injury and hence no one has conventional standing to sue. This is called a "generalized grievance."[25]

In this regard, the modern Court's work via the Establishment Clause to keep rightly ordered or separated church and state causes the Clause to operate in many respects like the structural clauses of the Constitution that separate the powers of the three Branches. And just as some violations of separation of powers can occur and there is no one personally harmed so no one has standing to sue, a "generalized grievance" can and does occur where there is a colorable violation of the modern Establishment Clause but no one with individualized harm. The first such case appeared before this Court in *Flast v. Cohen*, 392 U.S. 83 (1968), and the Court responded by permitting limited taxpayer standing. Stated differently, the surrogate of taxpayer as plaintiff with "injury in fact" permitted this Court to reach the merits of some no-establishment claims that would otherwise be nonjusticiable because no one had individuated injury to acquire standing.[26]

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[25] A famous trio of "generalized grievances" are represented by *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (colorable violation of structural clause in the Constitution, but no one with individualized injury and hence no one with standing), *United States v. Richardson*, 418 U.S. 166 (1974) (same), and *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (same).

[26] There is speculation in *Flast*, repeated in later cases, to the effect that federal taxpayers have a personal right of conscience to not have the taxes they pay be appropriated by Congress to religious organizations, even when the appropriations are for

But as the plurality in *Hein v. Freedom From Religion Foundation*[27] recently said, *Flast* inadequately acknowledged—even when limited as it was to claims under the Establishment Clause—the distortion wrought by recognizing taxpayer standing to the doctrine of separation of powers.[28] So *Flast*, while still good law, has not been expanded.

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secular purposes. James Madison's *Memorial and Remonstrance*, circulated in Virginia in the summer and fall of 1785, is cited as the origin of this assertion. However, Patrick Henry's bill, successfully opposed by Madison during Virginia's disestablishment struggles in 1784 and 1785, was legislation to impose a religious assessment for the payment of the salaries of Christian clergy. The assessment—or religious tax--was an earmarked tax. The money went into a special trust fund held by the state for the sole purpose of clergy salaries. Indeed, each taxpayer even got to designate which clergyman was to receive his or her tax payment. It was not a general tax the money of which went into the general U.S. Treasury, and from which at a later time Congress would appropriate money for all sorts of matters from B-2 bombers to price supports for dairy farmers. In the instance of an earmarked tax like Henry's, there is a direct causal link between taxpayer and the amount received by his or her clergyman. Causation being necessary to link the act of paying one's taxes under coercion to one's violation of religiously informed conscience. With most federal appropriations today, such as the Elementary and Secondary Education Act of 1965 at issue in *Flast*, there is no such causal link any more than a particular taxpayer is linked to dairy support payments. Justice Harlan, dissenting in *Flast*, saw the fiction in the personal conscience claim right from the start. *Flast*, 393 U.S. at 128-29. For a full account of the historical details, see Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776 – 1786*, 7 Geo. J. of L. & Pub. Pol'y 51 (2009).

[27] 551 U.S. 587, 127 S. Ct. 2553 (2007) (plurality opinion).

[28] *Id.* at 2569-70.

Flast is not the only line of cases where the modern Court reduced the normal rigor of standing when it comes to the Establishment Clause. The other line is where plaintiffs claim injury due to "unwanted exposure" to religious speech but who did not suffer the coercion or compulsion that would normally be associated with the individualized injury required for standing. Early on, as we saw in Point I, *supra*, the most common case was public school students exposed to prayer and biblical devotions, but the exercise was optional. This Court's response was to reduce the rigor of the required "injury in fact" by stating that coercion was not an element of a claim under the Establishment Clause. Like *Flast*, this necessarily required a trade off. With respect to the Court's co-ordinate Branches reducing the rigor of standing was at the expense of the doctrine of separation of powers. With respect to the States, the Court's reducing the rigor of standing was at the expense of federalism. In either instance, reducing the "injury" needed for standing permitted the Court to reach the merits of an Establishment Clause claim that would otherwise be outside the Court's subject matter jurisdiction as defined by U.S. Const. Art. III, § 2, cl. 1. Like *Flast*, however, the reduction in the rigor of normal standing requirements was narrow: only where the offended plaintiff's status naturally caused him or her to personally come into "unwanted exposure" to the government's religious expression was standing permitted.

Buono's status does not fit within the limits of this Court's narrow exception with respect to "unwanted exposure" cases. He has no

responsibilities as a local citizen, such as in *McCreary County*, to frequent the site at Sunrise Rock. He holds no status as a student or student's parent, such as in *McCollum* or *Schempp*, which results in his presence at the site of the Latin cross, nor is he a legislator needing to be present in chambers to do his job as in *Marsh*. Assuming he has paid the admission fee to enter the Preserve, certainly Buono has a legal right to be present at Sunrise Rock. But such a circumstance is no different than a citizen of India, who as a resident alien with a five-year visa to reside and work in Massachusetts, takes a vacation to Southeast California and pays the admission fee to enter the Preserve and happens to spot the Latin cross out of the windshield of his automobile as he drives by Sunrise Rock. This is one of those instances where if Buono has Article III standing to sue, then the entire population of people within the jurisdiction of the United States has standing to sue upon a single automobile drive along Cima Road. None of the Court's 16 cases set out in Point I, *supra*, is nearly so expansive.

CONCLUSION

Amici request this Court to reverse the United States Court of Appeals for the Ninth Circuit and order dismissal on the ground that Plaintiff-Respondent, Frank Buono, lacks standing.

Amici express no position on Question Presented No. 2,[29] which would require this Court to reach the merits of Buono's claim under the Establishment Clause.

Respectfully submitted,

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June 8, 2009

[29] Question Presented No. 2 reads: "Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands."

AMICUS CURIAE BRIEF

REPRINTED COPY (18)

No. 08-472

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND RENEWING AMERICAN LEADERSHIP IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Citizens United ("CU"), a Virginia corporation, is a nonprofit educational and advocacy membership organization exempt from federal income taxation pursuant to section 501(c)(4) of the Internal Revenue code ("IRC"). CU is dedicated to certain important principles, including those of limited government, national sovereignty and rights secured under the United States Constitution, and it presents and communicates its views and the views of its members on legislative and public policy issues to federal, state and local government officials, as well as the general public. Citizens United Foundation ("CUF"), a Virginia corporation, is a nonprofit, nonpartisan, educational organization exempt from federal income taxation pursuant to IRC section 501(c)(3). CUF conducts research and informs and educates the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution. This case is of particular importance to CU and CUF because it involves the very survival of any veterans'

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. These *amici curiae* requested and received the written consent of the parties to the filing of this *amicus curiae* brief, in the form of letters and/or emails from counsel of record for the respective parties. Such written consent has been submitted for filing to the Clerk of Court.

memorial on government land which can be linked to any kind of religious symbolism, however remote.

Renewing American Leadership ("ReAL") is a 501(c)(3) organization that promotes and preserves America's history and Godly heritage. ReAL was founded by Newt Gingrich, a long-time member of the U.S. House of Representatives, who served as Speaker of the House from 1995-1999. ReAL seeks to protect symbols of faith. Filing the amicus brief in this case fulfils ReAL's mission of defending religious freedom. Additionally, ReAL hopes to help protect the veterans' memorial in question in the Mojave Dessert for future generations.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals did not apply the appropriate standard in determining that the land exchange authorized by Congress to remedy the alleged Establishment Clause violation would nonetheless still violate the injunction issued by the district court. While the court of appeals did not explicitly state that the Act authorizing the land exchange is unconstitutional under the Establishment Clause, such a holding is inherent in the court of appeals decision. The decision rendered by the court of appeals did not follow clear precedent for determining whether an Establishment Clause violation exists as set forth recently in *Van Orden, infra.*, or earlier in *Lemon, infra.* Under either standard, it is clear that the Act authorizing the land exchange did not violate the injunction in this case and satisfies the Establishment Clause. The court of appeals, instead, purported to apply a standard established by the Seventh Circuit to evaluate the land

exchange in question. In so doing, it not only misapplied the standard set forth by the Seventh Circuit, but also ignored key considerations in determining whether an Establishment Clause violation exists.

ARGUMENT

I. The Court of Appeals Should Have Applied The Analysis Used In *Van Orden* to Evaluate The Act Authorizing The Land Exchange.

This case initially began as an Establishment Clause challenge to the Mojave Desert Veterans Memorial ("the Memorial"). The Establishment Clause as contained in the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Constitution Amend. I. The Memorial is in the shape of a cross and is located in the Mojave National Preserve (the "Preserve"), which is owned by the federal government. During the pendency of this case, Congress, recognizing the importance of having a government which is not too entangled in religion as required by the Establishment Clause, but also recognizing the need to preserve veterans' memorials, devised what seemed to be a simple solution to the problem: convey the land on which the Memorial sits to the Veterans of Foreign Wars ("VFW"), a private entity, in exchange for land of equal value. Congress did so by enacting Department of Defense Appropriation Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100 (the "Act"). The Act authorized a land exchange between the government and the VFW so that the land on which the Memorial is located could be exchanged for other land of equal value in the

Preserve owned by private individuals. The district court held that the land exchange would not remedy the Establishment Clause violation, and enjoined the government from carrying out the land exchange.

The court of appeals upheld the decision rendered by the district court. The court of appeals held that even if the land was transferred in accordance with the Act, such a transfer would not cure the Establishment Clause violation and the government would continue to violate the injunction issued by the district court. Thus, in essence, the court of appeals determined that the Act violated the Establishment Clause.[2] In making such a determination, the court of appeals failed to follow law established by this Court in *Van Orden, infra.* and *Lemon, infra.* to determine if the statute violates the Establishment Clause. Rather, the court of appeals evaluated the Act authorizing the land exchange under a standard established in the Seventh Circuit, without taking into account all of the proper considerations necessary to determine whether an Establishment Clause violation exists.

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[2] Although the court of appeals framed the issue on appeal as whether the Act violated the district court's injunction, the court of appeals' analysis focused on whether the Act violated the Establishment Clause. *Buono v. Kempthorne,* 527 F.3d 758, 778-79 (9th Cir. 2008) (stating that "[i]n *Buono II,* we noted that 'the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause.' But we left for another day the question of 'whether a transfer completed under section 8121 would pass constitutional muster.' In considering that question, we examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." (citations omitted)).

This case is similar to *Van Orden* as both involve Establishment Clause challenges to monuments. *Van Orden v. Perry*, 545 U.S. 677 (2005). The monument in *Van Orden* was on display on the grounds of the Texas State Capitol and consisted of a monolith with several symbols of religious significance, the most prominent being the text of the Ten Commandments. The monument was given to the State by the Fraternal Order of Eagles, a private civic organization, in order to "highlight the Commandments' role in shaping civic morality as part of the organization's efforts to combat juvenile delinquency." *Van Orden,* 545 U.S. at 701. In *Van Orden*, just as in this case, the monument had stood for decades without challenge until a citizen who encountered the monument brought suit seeking a declaration that the monument violated the Establishment Clause and an injunction for its removal.

The primary test utilized by this Court prior to *Van Orden* to evaluate possible Establishment Clause violations is the *Lemon* test. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). However, as noted by Chief Justice Rehnquist in *Van Orden,* the Court has not applied the *Lemon* test in every instance when an Establishment Clause challenge has been raised. *Van Orden*, 545 U.S. at 686. This Court declined to use the *Lemon* test in evaluating whether the monument at issue in *Van Orden* violated the Establishment Clause and stated: "[W]e think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.*

In determining the standard to use to evaluate whether a monument violates the Establishment Clause, this Court wisely acknowledged the need to recognize the "strong role played by religion and religious traditions throughout our Nation's history" while also being cognizant of the fact that "governmental intervention in religious matters can itself endanger religious freedom." *Id.* at 683, *citing, School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). The Court stated that "our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens." *Id. at 683.* Additionally, this Court has acknowledged the role of religion in our history and government. *Id.* at 212; *Engel v. Vitale,* 370 U.S. 421, 434 (1962).

In *Van Orden*, this Court recognized that the monument clearly had religious significance as it contained the text of the Ten Commandments. *Van Orden*, 545 U.S. at 690. However, this Court stated that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id., citing, Lynch v. Donnelly*, 465 U.S. 668, 680, 687 (1984); *Marsh v. Chambers,* 463 U.S. 783, 792 (1983); *McGowan v. Maryland,* 366 U.S. 420, 437-440 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678 (1970). Justice Scalia stated in his concurring opinion in *Van Orden* "that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden,* 545 U.S. at 692. This Court in *Van Orden* focused moreso on the use of the text of the Ten Commandments

rather than any religious symbolism that might be associated with the text. In so doing, the Court recognized that even though the Ten Commandments undoubtedly have religious significance, the text used in the monument at issue had a more passive use as it relates to religion rather than a more primary use of supporting a particular religion. *Van Orden,* 545 U.S. 677.

The standard as espoused in *Van Orden,* is the most appropriate standard to evaluate whether a monument violates the Establishment Clause and should have been used by the court of appeals to evaluate the Act authorizing the land exchange and the continued display of the Monument at issue in this case. The sole purpose of the Act authorizing the land exchange was to preserve the Memorial and to remedy the alleged violation of the Establishment Clause. The purpose of the Memorial is to honor all veterans of World War I irrespective of religion. The purposes of the Act and the Memorial are far more passive than the purpose associated with the memorial in the *Van Orden* case, which was "to highlight the Ten Commandments' role in shaping civic morality, as part of the organization's efforts to combat juvenile delinquency." *Id.* at 701. Thus, in applying the reasoning set forth in *Van* Orden, the purpose of the Act in authorizing the land exchange to preserve the veteran's memorial and the continued presence of the cross on the transferred land is clearly passive as it relates to religion.

Further, this country has a rich history for honoring its veterans. There are numerous veterans memorials located in various places throughout this country. Many of them are located on government

land and contain religious text or symbolism (e.g. various monuments in Arlington Cemetery, Chaplain's Hill Monument, the Confederate War Memorial, the Spanish-American War Monument, the Space Shuttle Challenger Memorial, and the Peace Monument located in our Nation's capitol). The history of the Act, the Memorial, and veterans' memorials in general, are strong evidence of the passive nature of the Act. The purpose of the Act authorizing the land exchange clearly satisfies the "passive monument" standard.

Justice Breyer in his concurring opinion in *Van Orden*, referred to the memorial in that case as a borderline case. *Van Orden*, 545 U.S. at 700. In issuing his concurrence, Justice Breyer noted that "the circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter [referring to a secular message], nonreligious aspects of the tablets message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect." *Van Orden* 545 U.S. at 701.

The message associated with the Act authorizing the land exchange and the continued presence of the cross on the land is far more subdued than the message associated with the memorial in *Van Orden*. First, neither the Act authorizing the land exchange nor the Memorial at issue in this case contain any text which would indicate that there is any religious purpose associated with the transfer of the land or the Memorial itself. The language of the Act clearly indicates that its purpose is a secular one, which is to preserve the Memorial. Likewise, the Memorial itself contains no text which has any religious significance whatsoever. Earlier in its existence, the Memorial had

two signs along side it which read: "The Cross, Erected In memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884." Pet. App. 56a. Although those signs are no longer present, there presence in the past and the text inscribed on them is a clear indication of the Memorial's secular purpose and the secular purpose of the Act authorizing the land exchange.

In determining that the monument in *Van Orden* did not violate the Establishment Clause, Justice Breyer noted that the monument had been in existence for 40 years prior to any challenge. *Van Orden*, 545 U.S. at 703. According to Justice Breyer, this was strong evidence of the fact that the nonreligious aspects of the monument predominated. *Id.* The Memorial at issue in this case was in existence for approximately 70 years before it was ever challenged. Under Justice Breyer's analysis, this is even a stronger indicator of the secular nature of the Memorial than that which was associated with the memorial in *Van Orden*.

Additionally, Justice Breyer looked at the setting of the monument in *Van Orden* noting that the monument is located in a large park with 17 monuments and 21 historical markers. *Van Orden*, 545 U.S. at 626. Justice Breyer stated that "the physical setting of the monument, moreover, suggests little or nothing of the sacred." *Id.* While the Monument in this case is not in close vicinity to other monuments and historical markers, the same reasoning used by Justice Breyer concerning the monument in *Van Orden* can be applied to the Monument in this case, because it is located in a

remote location in the desert and contains no indication that it has a religious purpose other than the fact that it is in the shape of a cross. Just as in *Van Orden*, the setting of the Monument does not readily lend itself to religious activity.

The standard used by this Court in *Van Orden* to evaluate whether a monument violates the Establishment Clause strikes the appropriate balance between the competing interests of recognizing the role of religion in our history and government while guarding against excessive government entanglement with religion. There are numerous monuments in this country located on government land. Each, obviously, has significant historical significance. Many of them also contain representations of religious significance. A test which does not consider the passive nature of such monuments puts a large portion of this country's historical monuments in jeopardy.

Based upon the foregoing, it is clear that the Act which allowed for the land exchange, and the continued display of the Memorial on the land meets the criteria established by the majority in *Van Orden* and does not violate the Establishment Clause.

II. The Act Authorizing The Land Exchange Even If Evaluated Under The *Lemon* Test Does Not Violate The Establishment Clause.

As mentioned previously, the standard which has been often utilized in the past to evaluate whether an Establishment Clause violation exists is the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Lemon test consists of three prongs: (1) whether the government activity in question has a secular purpose,

(2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Id.* at 612-13. If the State action fails to satisfy any of these prongs, it violates the Establishment Clause. *Id.* The *Lemon* test is more formulaic than the test utilized by this Court in *Van Orden*, but even under the *Lemon* test, the Act authorizing the land exchange, and the continued presence of the cross on the land conveyed to the VFW still does not violate the Establishment Clause.

A. The Act Authorizing The Land Exchange Has A Secular Purpose.

The Act authorizing the land exchange served the secular purpose of preserving the Memorial which commemorates the service of all veterans. In determining whether government action affecting a religious symbol has a secular purpose, a government's characterization of its purpose is entitled to deference. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000).

There is no language in the Act, which suggests that it does not have a secular purpose. The Act provides that the Secretary of the Interior shall convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 of the Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A. § 8137(a), 115 Stat. 2278) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned five-acre parcel of land elsewhere in

the Preserve. Department of Defense Appropriation Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. It is clear by the language contained in the Act that its purpose is purely a secular one. The mere fact that the Memorial which sits on the land is in the shape of a cross does not make the purpose of the Act a religious one or establish the existence of a violation of the Establishment Clause. *Van Orden,* 545 U.S. at 743. The purpose of government action and therefore the existence of government neutrality is discerned from its text, structure, purpose and history as well as the body of evidence contained in the record. *Paulson v. Abdelnour,* 145 Cal. App. 4th 400 (2006), *citing, McCreary County v. ACLU of Ky.,* 545 U.S. 844, 861, 868 (2005).

In order to preserve the Memorial, the government chose to authorize a land exchange and relinquish ownership of the Memorial rather than remove it. This scenario is similar to the scenario in the *Mercier* case in the Seventh Circuit involving a Ten Commandments monument in a public park. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). The City defendant in that case chose to sell the monument back to the private party that donated it rather than remove it. *Id.* The court stated that "while removal was an option, so also was the sale. By selling the Monument site to end a perceived endorsement, the City exercised an option that served a secular purpose." *Mercier,* 395 F.3d at 705. In this case, the government when faced with an Establishment Clause challenge, chose to arrange for a land exchange rather than remove the Memorial. Such a choice, and thus the Act, served a secular purpose, similar to *Mercier.*

B. The Primary Purpose of The Act Authorizing The Land Exchange Does Not Advance Or Inhibit Religion.

The Act authorizing the land exchange and the continued presence of the cross on the land transferred to the VFW does not advance or inhibit religion. In order to make such a determination one must not focus on the intent of the government creating the Act authorizing the land transfer, but whether a reasonable person, apprised of the circumstances surrounding the sale, would conclude that the sale amounted to an endorsement of religion. *Mercier*, 395 F.3d at 705, *citing*, *Lynch*, 465 U.S. at 690; *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 304 (7th Cir. 2000); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). Just as in *Mercier*, if the history of the Memorial is considered along with the events leading up to the passage of the Act in order to save it, a reasonable person would understand the government's desire to preserve the Memorial rather than allow its removal. *Mercier*, 395 F.3d at 705. The government attempted to transfer ownership of the Memorial back to the VFW, the original donor, similar to *Mercier* where the monument was sold back to the original donor. The VFW was the logical purchaser, just as the original donor in *Mercier* was the logical purchaser. *Id.* Still further, the Memorial is located in the Preserve in a location which is not near any public schools, government buildings, or any public structure. Although the Preserve is on government land, there is also land owned by private individuals located in the Preserve. These facts would indicate that a reasonable person would understand that the Act authorizing the land exchange and the continued presence of the Memorial on the land does

not serve to advance or inhibit religion, but rather has the purpose of preserving the Memorial which honors all veterans.

C. The Act Authorizing The Land Transfer Does Not Foster An Excessive Entanglement With Religion.

In evaluating whether a government act constitutes excessive entanglement with religion, the Court looks to "the character and purposes of the institutions benefited, the nature of the aid provided by the government, and the resulting relationship between the government and the religious authority." *Paulson*, 145 Cal. App. 4th at 431, *citing, Lemon*, 403 U.S. at 613.

One of the main points emphasized by the court of appeals was that even if the land exchange was effectuated, the government involvement with the Memorial would still be excessive. The court of appeals' position is clearly not supported by the facts surrounding the land exchange. First, the Act transfers the land on which the Memorial sits to the VFW in exchange for land of comparable value. The exchange was a fair exchange. One of the focuses of the court of appeals was that the Act provided that the government would have a reversionary interest in the property exchanged. While the Act provides that the property would revert back to the government in the event that it is no longer used as a war memorial, this is not significant enough to suggest excessive involvement by the government. The government is certainly not prohibited by the Establishment Clause from encouraging the continued existence of veterans' memorials. An important point to note here is that

language contained in the Act does not make reference to or require the VFW to maintain the cross as the Memorial. It only requires the VFW to maintain the property as a war memorial. Further, in examining the relationship between the government and the VFW as a result of the Act, there simply is no relationship between the parties other than parties engaging in a transaction concerning the land exchange. There is nothing in the Act which would suggest a continuing relationship once the land has been exchanged. Still further, the VFW is not a religious organization, but rather one that is committed to serving all veterans.

What is clear concerning the land exchange authorized by the Act is that once the land is transferred to the VFW, a private entity, it will own the land and be responsible for maintaining the Memorial in the manner it deems appropriate. The government will have little, if any involvement with the Memorial once the land exchange is consummated. Therefore, the Act which authorized the land exchange does not foster an excessive entanglement with religion.

Based upon the foregoing, it is clear that the Act which allowed for the land exchange, and the continued display of the Memorial on the land meets the criteria set forth in the *Lemon* test and does not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, *amici curiae* Citizens United, Citizens United Foundation, and Renewing American Leadership respectfully submit that the

judgment of the court below should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JUN 5 - 2009
OFFICE OF THE CLERK

No. 08-472

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KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
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FRANK BUONO,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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June 5, 2009

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display items that have both religious and historical significance, such as the cross that is a component of the war memorial at issue here.

SUMMARY OF THE ARGUMENT

The court of appeals' decision articulates a formulation of the standing doctrine that is so broad that it would allow any party to bring any claim no matter how tenuous the party's alleged injury. As such, it directly conflicts with this Court's precedents. The Court has made clear that a plaintiff must suffer an actual and concrete injury in order to seek relief from the federal courts. Here, where plaintiff acknowledges that he is not personally offended by the display of a cross as part of a war memorial, that tangible injury is plainly missing.

If this Court reaches the merits, it should reverse the court of appeals' decision. The Ninth Circuit's decision is a

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part; nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

textbook example of the flawed outcomes that have resulted under the Court's "endorsement" test. Neither the text nor history of the Establishment Clause suggests that the presence of a cross in a war memorial, much less a congressionally-approved transfer of the land on which the war memorial sits to a private party for fair value, violates the Constitution. Indeed, the display of crosses and other religious symbolism as part of war memorials on government land is routine and well-ingrained in our nation's history.

Because the courts' application of the endorsement test has led to such flawed outcomes, it should be abandoned in favor of a test akin to that articulated by the plurality in *Van Orden v. Perry*. Displays of religious symbolism that also have established historical or other secular meaning are plainly permissible under the Establishment Clause. The fact that they also have some religious meaning does not render them unconstitutional.

A cross that is part of a war memorial on government land cannot be construed as an "endorsement" of any particular religious doctrine. Nor is it impermissible "endorsement" of religion for Congress to attempt to cure alleged constitutional violations by transferring the land on which the display is found to a private party for fair value. Indeed, the court of appeals' decision here is striking. It summarily enjoins a carefully-crafted statute passed with overwhelming congressional support that was specifically designed to cure the very constitutional defect the court cites. The court of appeals' decision is contrary to the text and history of the Establishment Clause as well as the interpretation of that clause by a coordinate branch of government and should not stand.

ARGUMENT

I. The Court Of Appeals' Decision Articulates A Formulation Of The Standing Doctrine That Is Inconsistent With This Court's Precedents.

This Court has articulated well-established elements that comprise the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In order to satisfy the "case or controversy" requirement under Article III, a plaintiff must demonstrate (1) that he has suffered an "injury in fact," (2) that there is a causal relationship between the injury and the challenged conduct, and (3) that the injury will be "redressed by a favorable decision." *Id.* at 560-61. A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Mere allegations of "injury" will not suffice—the injury must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

This Court's precedents make clear that a generalized objection to the unconstitutional expenditure of government funds is insufficient to confer standing. "As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2563 (2007). Likewise, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107; *see also Valley Forge*

Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982) (finding insufficient injury to confer standing where plaintiffs "fail[ed] to identify any personal injury suffered by them . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees").

The rules governing standing apply with equal force to plaintiff's allegations here. *See Valley Forge*, 454 U.S. at 489 (holding that an allegation of mere psychic injury "does not become more palatable when the underlying merits concern the Establishment Clause").[2] Thus, in the context of the Establishment Clause, a plaintiff attempting to demonstrate an injury in fact must claim that he was "subjected to unwelcome *religious exercises* or [was] forced to assume special burdens to avoid them." *Id.* at 487 n.22 (emphasis added). "Religious exercises" are not simply "conduct with which one disagrees." *Id.* at 485-86. Rather, there must be a direct and personal nexus between the alleged Establishment Clause violation and the plaintiff's alleged injury.

These requirements are clearly absent in the present case. As the district court noted, plaintiff Buono is a "practicing Roman Catholic" who "does not find a cross itself

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[2] Indeed, in *Valley Forge*, a majority of this Court criticized the purported Establishment Clause exceptions to the taxpayer-standing rules that had been read into the Court's decisions in *Frothingham v. Mellon*, 262 U.S. 447 (1923) and *Flast v. Cohen*, 392 U.S. 83 (1968). *See Valley Forge*, 454 U.S. at 484-85 n.20 ("Justice Brennan's dissent is premised on a revisionist reading of our precedents . . . . [T]he dissent must shoulder the burden of explaining why taxpayers with standing have no 'legal interest' in congressional expenditures except when it is possible to allege a violation of the Establishment Clause . . . . [B]oth claims have been rejected, precisely because Art. III requires a demonstration of redressable injury that is not satisfied by a claim that tax moneys have been spent unlawfully.").

objectionable." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002). Rather, he is "deeply offended by the cross display on public land *in an area that is not open to others to put up whatever symbols they choose.*" *Id.* (emphasis added). Accordingly, plaintiff's alleged injury is merely disagreement with observed government conduct—the precise type of allegation foreclosed by this Court's prior decisions. *See Hein*, 127 S. Ct. at 2563; *Steel Co.*, 523 U.S. at 107; *Valley Forge*, 454 U.S. at 485. Plaintiff simply lacks any direct and personal injury sufficient to confer Article III standing.

Indeed, it is unclear that plaintiff has suffered *any* injury here. In *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), this Court unanimously held that while "government speech must comport with the Establishment Clause," the government is nonetheless free to select the views that it wants to express under the Free Speech Clause. *Id.* at 1131-32. Accordingly, this Court ruled that the government was free to allow the display of the Ten Commandments at a public park, even though it had rejected requests to display other monuments. As the Court observed, the government's general practice "with respect to donated monuments has been one of selective receptivity," and such government decisionmaking does not raise any free speech concerns. *Id.* at 1133.

While plaintiff here attempts to frame his lawsuit in the guise of an Establishment Clause challenge, the gravamen of his complaint is exactly the same as that in *Summum*. From 1995 until 1999, Mr. Buono was aware of the cross displayed as part of the war memorial erected by the Veterans of Foreign Wars, but was never offended by its presence. Rather, Buono alleges that he first took offense in 1999, when he discovered that the government would not open the land to allow "others to put up whatever symbols they choose." *Buono*, 212 F. Supp. 2d at 1207. Accordingly, as in *Summum*, plaintiff here complains that the

government has failed to create a public forum by failing to allow others to alter, or add to, a pre-existing war memorial erected by a private organization. However, unlike the plaintiff in *Summum*, Buono has not personally applied for, or been denied access to, that forum. Instead, he merely contends that he is offended by the fact that the government has allegedly denied access to that forum *to others*.

This is certainly not the kind of "personal stake in the outcome of the controversy" that this Court has found necessary to "invo[ke] federal-court jurisdiction and to justify exercise of the court's remedial powers" on a plaintiff's behalf. *See Warth*, 422 U.S. at 498 (quoting *Baker*, 369 U.S. at 204); *see id.* at 499 ("A federal court's jurisdiction . . . can be invoked only when *the plaintiff himself has suffered* some threatened or actual injury . . . .") (emphasis added, quotations omitted). Mr. Buono's complaint simply cannot be squared with this Court's "general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Accordingly, plaintiff does not even allege a compensable legal injury, much less the sort of particularized, individual injury sufficient to confer standing.

II. The Court Should Formally Abandon The "Endorsement Test" Because It Leads To Outcomes That Are Inconsistent With The Plain Language Of The Establishment Clause And Manifests Hostility To Religion.

If this Court reaches the merits of Mr. Buono's claim, it should reverse the court of appeals' decision and use this opportunity to clarify the standards for evaluating challenges to government action under the Establishment Clause. The court of appeals' decision was premised on its finding that there was an "improper governmental endorsement of religion" that "has not actually ceased." *See Buono v. Kempthorne*, 527 F.3d 758, 782-83 (9th Cir. 2008).

However, the "endorsement test" has been the subject of extensive judicial and academic criticism because it is hopelessly vague and results in outcomes that are inconsistent with the Constitution's plain meaning.[3]

Both the constitutional text and early practice suggest that official acknowledgments of religion by the government were not deemed impermissible.[4] Indeed, official acknowledgments of religion have been commonplace in our public life for hundreds of years.[5] As this Court has

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[3] *See, e.g.*, Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 285-86 (2003) (observing that commentators "have criticized the endorsement test as being inconsistent with historical practice" and failing to "bring coherence" to the Establishment Clause analysis); Stephen D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987) ("Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the 'no endorsement' test would introduce further ambiguities and analytical deficiencies into the doctrine."); Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 265 (2006) ("Since its inception, the endorsement test has been the subject of intense scholarly and judicial criticism.").

[4] *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 787 (1983) ("The tradition in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain."); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1116 (1998) ("In the period between the Founding and Reconstruction, the federal government involved itself with religion and religious exercise in a variety of ways."); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 B.Y.U. L. REV. 755, 765 (observing that "[i]n addition to urging the Thanksgiving Proclamation, the House of Representatives authorized the use of its hall for religious services, and the First Congress established a Congressional Chaplain system").

[5] *See* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 88 (1964) ("During the period

consistently recognized, throughout our nation's history "religion has been closely identified with our history and government." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963). "The history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962), and "[i]nteraction between church and state is inevitable." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213. Indeed, there has been "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Thus, this Court has declared that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The "endorsement test" conflicts with this longstanding history. Indeed, in *Van Orden v. Perry* a plurality of this Court expressly rejected the notion that the endorsement test should be used to evaluate a passive, longstanding historical monument on public land, such as the one at issue here. *See* 545 U.S. 677, 686-87 (2005) (plurality opinion) (concluding that the appropriate test for a "passive monument" "is driven both by the nature of the monument and by our Nation's history"); *see also id.* at 700-01 (Breyer, J., concurring in the judgment) (explaining that "this Court's other tests,"

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immediately after the Revolution and previous to the ratification of the federal Bill of Rights, it was generally acknowledged from one end of the nation to the other that government should not be hostile to religion. Indeed, the activities of the Continental Congress indicate clearly that this body was pleased to promote the cause of religion.").

including the "endorsement test," cannot "readily explain the Establishment Clause[]").[6]

The *Van Orden* plurality concluded that the Establishment Clause analysis in such cases should be "driven both by the nature of the monument and by our Nation's history." *Id.* at 686. The plurality emphasized that "[s]imply having religious content or promoting a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. In fact, a contrary rule would "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Id.* at 684. Thus, the plurality found that a longstanding display of the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause. As the plurality opinion observed, references to the Ten Commandments are "common throughout America" and have "an undeniable historical meaning." *Id.* at 688, 690.

Justice Breyer's concurrence in *Van Orden* likewise observed that a monument or display may be constitutionally permissible even if it "undeniably has a religious message," because it could also convey a "secular moral message" or "historical message." *Id.* at 700-01 (Breyer, J. concurring in the judgment). Indeed, as Justice Breyer noted, "a contrary conclusion . . . would . . . lead the law to exhibit a hostility to religion that has no place in our Establishment Clause traditions" and could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704.

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[6] The Court specifically referenced the endorsement test in a companion Ten Commandments case, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005). There, however, the facts were much different. The majority found that the case involved a "short (and stormy) history" of legislative attempts demonstrating "substantial religious objectives of those who mounted them." *See Van Orden*, 545 U.S. at 703.

Consistent with the approach in *Van Orden*, this Court has repeatedly upheld government displays of religious symbols where such displays also conveyed a secular meaning. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah); *see also* Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 98 (2007).[7]

This case falls squarely within the Court's holding in *Van Orden*. Both the "nature of the monument" and our history and customs indicate that the memorial is constitutionally permissible. *See Van Orden*, 545 U.S. at 686-87. Crosses are frequently used to memorialize the deceased on public lands. *See Buono*, 527 F.3d at 765 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that

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[7] This Court has likewise upheld numerous government policies or acknowledgements of religion—which provided far greater benefit to religion than any incidental benefits provided here—so long as the policies in question were not undertaken for an "exclusively religious" purpose. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a school voucher program even though a majority of students had enrolled in religious schools); *Zobrest v. Catalina Foothills Schools Dist.*, 509 U.S. 1 (1993) (upholding a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (upholding a vocational scholarship program that provided aid to a student at a religious institution studying to become a pastor); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding the Nebraska legislature's practice of opening legislative sessions with a prayer on the ground that such practices were "deeply embedded in the history and tradition of this country"); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing non-categorical grants to church-sponsored colleges and universities); *Tilton v. Richardson*, 403 U.S. 672 (1971) (permitting federal grants for college buildings of church-sponsored institutions).

the cross "serves the secular purpose of memorializing fallen soldiers"). Such "[s]ectarian identifications on markers" do not violate the Establishment Clause. *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring in the judgment). There is simply nothing constitutionally questionable about a religious symbol being used to commemorate the lives of deceased war veterans. A contrary holding would undermine one of the few bright lines drawn in the Establishment Clause context and invite protracted litigation regarding displays across the nation—including other war memorials and cemeteries—that have heretofore never raised constitutional concerns.

Indeed, the court of appeals' decision demonstrates the inherently flawed nature of the endorsement test and its hostility to religious expression. The court of appeals ruled that a display that had gone unchallenged for approximately seventy years constituted an "establishment" of religion and, moreover, that a reasonable attempt by Congress to cure such alleged violation was itself an "endorsement" of religion. *Cf. Van Orden*, 545 U.S. at 702 (Breyer, J. concurring) (given that Ten Commandments monument had stood unchallenged for approximately 40 years, "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect").

While this Court has underscored that the endorsement test is an objective one based on the perceptions of a "reasonable" observer, in practice it has frequently degenerated to authorize a heckler's veto of legitimate religious expression. *See McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 872-74 (2005) (confirming objective nature of the test); *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring) (same). In doing so, it manifests an inherent bias against religious expression and in the process only perpetuates "the very kind of religiously

based divisiveness that the Establishment Clause seeks to avoid." *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). Because it is inconsistent with the text and history of the Establishment Clause, the endorsement test should be abandoned.[8]

III. Congress Remedied Any Alleged Constitutional Violation By Transferring The Land On Which The Memorial Sits To A Private Party For Fair Value.

Even if the war memorial at issue here could be viewed as properly raising constitutional concerns (and for the reasons discussed above, it cannot), any such problems were remedied by the congressional legislation transferring the land on which the memorial sits to the VFW for fair value. It is axiomatic that "an Establishment Clause violation must be moored in government action of some sort." *Pinette*, 515 U.S. at 779. Without government action, there is no constitutional claim. Accordingly, once Congress transferred the land on which the memorial sits to a private party, there was no longer a cause of action under the Establishment Clause.

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[8] The Court may also wish to take the opportunity to expressly abandon the three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Van Orden v. Perry*, 545 U.S. 677, 685-86 (2005) (observing that "our recent cases simply have not applied the *Lemon* test"). Indeed, at least one circuit sitting *en banc* has concluded that the Court effectively abandoned this test in *Van Orden*. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test."). As with the endorsement formulation, the *Lemon* test has been criticized as being inconsistent with the text and history of the Establishment Clause as well as leading to arbitrary outcomes. *See supra* note 3.

The court of appeals' contrary decision is inconsistent with well-reasoned decisions issued by other courts of appeals involving nearly identical facts. For example, drawing upon this Court's holding in *Evans v. Newton*, 382 U.S. 296 (1966), the Seventh Circuit has concluded that a similar land transfer "effectively ended state action" and "validly extinguished any government endorsement of religion" where the parties "performed the necessary formalities to effect a transfer of property, paid a fair price and assumed traditional duties of ownership." *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000). This was true even though the government imposed a restrictive covenant that maintained some lingering government interest in the transferred property. *Id.* at 492-93. The court found, in straightforward fashion, that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Id.* at 491.

The Seventh Circuit reached a similar conclusion in *Mercer v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). Relying on *Marshfield*, the court held that the sale of a small parcel of land containing a Ten Commandments monument was sufficient to cure any alleged Establishment Clause violation. *Id.* at 702. The court rejected the plaintiff's contention that the government's action in "keep[ing] the monument in its challenged location" violated the Establishment Clause. Rather, as the court observed, such a sale effectively eliminated any constitutional problems where there were "no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." *Id. See also Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1260 (10th Cir. 2005) (sale of easement was proper to "avoid further litigation involving potential constitutional violations").

As the Seventh Circuit correctly recognized, under this Court's precedents, it is only the "unusual" or

"extraordinary" case in which such land transfers will not effectively cure alleged Establishment Clause violations. A violation may persist only where "a set of unusual facts and circumstances demonstrate[] that the government remain[s] *intimately involved in exclusively public functions* that ha[ve] been delegated to private organizations." *Marshfield*, 203 F.3d at 492 (citing *Evans*, 382 U.S. 296) (emphasis added). In *Evans*, for example, an entire park was turned over to "private" trustees, but the municipality continued to sweep, manicure, water, patrol, and maintain the park. *Evans*, 382 U.S. at 301. The municipality completely controlled the park, exempted it from taxation, and continued to keep it segregated, reserving its use to whites only. *Id.*

In stark contrast, there is *no* evidence in this case that the federal government has remained involved, much less "intimately involved" in the maintenance of the war memorial here. *See Buono*, 527 F.3d at 763 (O'Scannlain, J., dissenting from denial of rehearing en banc) (finding that there is no evidence that the government "has maintained or will maintain or support" the memorial after the land transfer). In reaching its erroneous conclusion, the court of appeals relied upon the fact that the National Park Service manages the preserve that surrounds the war memorial. However, as a result of the land transfer, the parcel on which the war memorial sits is no longer part of the preserve that is maintained by the government. *See id.* at 779. There is simply nothing in this Court's precedent, and certainly nothing in the Constitution, that would render a monument impermissible merely because the areas *surrounding the parcel* are maintained by the government, while the parcel itself is not.

It bears noting that a contrary ruling would have wide-ranging negative effects. The Ninth Circuit's decision would seemingly require complete divestment of an entire park in order to cure an Establishment Clause violation; reasonable, targeted transfers like the one in this case would seldom, if

ever, be effective. At bottom, the court of appeals' decision would make it almost impossible for the government to cure alleged Establishment Clause violations while preserving longstanding monuments and memorials that have significant historical significance. *See Buono*, 527 F.3d at 762 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("The opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated."). Moreover, it would do so in the face of a strong expression of contrary congressional understanding. Congress overwhelming approved the land transfer, taking steps to carefully ensure that the transfer was for fair value and that the government would not have any ongoing role in the administration of the war memorial. *See* Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(c), (d), 117 Stat. 1100.

In sharp contrast to the rule adopted by the Ninth Circuit, it is well established that alleged Establishment Clause violations *can* be cured. The federal reports are filled with cases from this Court and numerous courts of appeals upholding displays or government policies that have become permissible, even if their origins may have been susceptible to constitutional challenge. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 431 (1961) (upholding "Sunday closing laws" even though "the original laws which dealt with Sunday labor were motivated by religious forces"); *ACLU of New Jersey v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (upholding a display containing religious content, even though a prior display was held to violate the Establishment Clause); *Granzeier v. Middleton*, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995) (same). Of

course, for reasons discussed above, the monument in the present case never violated the Establishment Clause. However, even if it had, "the fact that a particular [monument] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Granzeier*, 173 F.3d at 574.

The Ninth Circuit's ruling exhibits precisely the type of "hostility toward religion" that the Court found impermissible in *Van Orden v. Perry*. *See* 545 U.S. at 704 (Breyer, J. concurring in the judgment) (noting that "hostility toward religion . . . has no place in our Establishment Clause traditions"). The court of appeals' decision enjoining carefully-crafted congressional action designed to avoid any alleged constitutional concerns should be overturned.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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Dated: June 5, 2009

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE FAITH AND ACTION, INSTITUTE IN BASIC LIFE PRINCIPLES, INTERNATIONAL REAPERS FOUNDATION, AND A COMMITTEE OF CONCERNED AMERICAN CITIZENS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE IN THIS CASE[1]

Faith and Action, Institute in Basic Life Principles, International Reapers Foundation, and a Committee of Concerned American Citizens ask why the Declaration of Independence has not been cited as controlling law in cases involving the galimatias and unconstitutional "doctrine" of "separation of church and state," and specifically why is not the Declaration controlling law?

SUMMARY

A constitutional distinction as different as night from day exists between creating a nation and thereafter interpreting its laws. The Declaration of Independence was "created" and contains the foundational rule of law of the United States and cannot be changed. It is not ceremonial but founding law. The Declaration is not trumped by the First Amendment.

The seminal decision in *Everson v. Board of Education*, 330 U.S.1 (1947) and the subsequent opinions built on that decision are constitutionally invalid as repugnant to the Declaration of Independence. Consequently the Ninth Circuit's reliance on that erroneous premise in ruling a war Memorial erected in 1939 in the shape of a cross

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

retroactively breaches the "establishment clause" is patently wrong and should be reversed for the proper reasons.

LET REASON REIGN

Setting aside previous opinions and a train load of rhetoric, a realistic reading of the unequivocal language utilized in the Declaration of Independence dictates the undeniable conclusion that the Declaration uncategorically recognizes God as our Creator and that God is the source of our rights and moral laws.

It is likewise indisputable that Supreme Court rulings are rejecting as unconstitutional the government's expression of God and his moral laws, and that such opinions are therefore incompatible with the Declaration.

The logic utilized to violate the Declaration is that the Constitution is simply a freestanding independent document without a foundation of any kind and that the Declaration must be ignored when interpreting the Constitution. The consequence of this is that there are no moral truths and that there is no purpose or stated objective to our government.

In essence, for all constitutional purposes, this court has decided that the Declaration of Independence is unconstitutional.

It is time now for this court to face that issue head on and deal with it. Either this nation is to be controlled and governed by the foundational law in the Declaration

and the Constitution interpreted by its rule of law, or we have become a nation without God and dependent solely upon human reasoning. This court does not live in a vacuum and must be cognizant of what is currently going on morally in this nation, particularly among our young people and the anti-theistic teaching in our schools.

To this end amici curiae, although unable to orally argue this point, asks this court to once and for all examine the roots of the foundation of this nation which embodies the terms, "laws of nature and of nature's God." In light of our modern-day culture, to also carefully evaluate the disastrous consequences, which are historically documented and prophesied will occur, if the foundational law established by the Founders in the Declaration is abandoned.

The infamous *Dred Scott v. Sandford*, 60 U.S. (19 Howell.) 393 (1857) case defined "citizen" in stark violation of the Declaration of Independence in order to achieve a personal and political objective. The decision was so heinous it prompted Abraham Lincoln in his debate with Douglas to challenge the listener to a careful review and they ". . . will see what a mere wreck — mangled ruin — it makes of our once glorious Declaration."[2]

After Lincoln's election as President, he issued a proclamation on March 13, 1863 warning that the Civil War was God's judgment; ". . . those nations only are blessed whose God is the Lord . . . . [b]y His divine law,

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[2] "Speech in Springfield, Illinois, June 26, 1857." The Complete Works of Abraham Lincoln, vol.2, Ed. John G. Nicolay and John Hay. New York: France's D. Tandy, 1894, 315-339.

nations like individuals are subjected to punishments and chastisements in this world, may we not justly fear that the awful calamity of civil war, which now desolate the land, may be but a punishment, inflicted upon us for our presumptuous sins . . ."[3]

A careful review of the fundamentals of the *Dred Scott* case and its legally errant reasoning identifies the core problem in *Everson* and its progeny reflected in the Ninth Circuit decision below.

THE DECLARATION OF INDEPENDENCE MUST CONTROL THE INTERPRETATION OF THE FIRST AMENDMENT

In drafting the Declaration of Independence, the Founders faced a daunting challenge; they were not only constructing a document giving birth to a new nation, the United States of America, but were responsible for erecting a foundation of legal principles[4] to provide for a stable and lasting society and a system of justice. There had to be unanimous agreement. It was not a challenge for the fainthearted or indecisive because each paid a terrible price for signing that document.

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[3] Senator James Harlan of Iowa, whose daughter later married President Lincoln's son Robert, introduced this Resolution in the Senate on March 2, 1863. The Resolution asked President Lincoln to proclaim a national day of prayer and fasting. The Resolution was adopted on March 3, and signed by Lincoln on March 30, one month before the fast day was observed. Source: *Collected Works of Abraham Lincoln*, edited by Roy P. Basler.

[4] A principle is defined as a comprehensive and fundamental law.

It is incumbent to keep in mind they were not evaluating and interpreting existing law in order to render an opinion but originating a foundation for the future of a nation which document could not be amended or changed.

The Founders were tough-minded independent thinkers, extremely well read and educated. The governmental principles and the words chosen to describe those principles would require a precise definition to communicate precisely their objective of freedom and source of rights upon which the new government would be built.

The content came not only from their own discernment and experience but was studiously checked against the astute logic expressed in the writings of such men as Marcus Tullius Cicero, William Blackstone, John Locke, Richard Hooker, the Bible, and several others.

Unanimous agreement existed among the Founders that Natural Law constituted the only reliable basis for the continued existence of a stable society and system of justice. The principles of Natural Law linked the rules of right conduct with the laws of the Supreme Creator of the universe.[5]

The Founders were familiar with the political powers of the day and the authoritative rule of the King. That

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[5] The overwhelming evidence in our present culture demonstrates beyond a reasonable doubt the moral chaos resulting from the departure from the principles of the Declaration.

kind of governmental structure was anathema to their objective for the new government. The government being created by the Founders was to provide freedom for the individual and an absolute source of rights not dependent upon the "whims" of human reasoning.

The ancient writings of the astute and tough-minded Cicero resonated with the reasoning of the Founders. (Of course Cicero's opinions cost him his head).[6]

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . It is a sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and at all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, it's promulgater, and it's enforcing judge. Whoever is disobedient is fleeing from himself

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[6] Citations to Cicero's comments pertaining to Natural Law may be found in Levy, Natural Law in the Roman Period, in University of Notre Dame Natural Law Institute Proceedings II (1949).

> and denying his human nature, and by reason of this very fact he will suffer the worst punishment. (Quoted in Ebenstein, Great Political Thinkers, p.133)

The "Fundamental Orders of Connecticut" written by the Rev. Thomas Hooker were adopted in 1639 as the first written constitution in modern times. They likewise were in accord with the Founders' principles. The "Orders" were predicated on the principles recorded by Moses in the first chapter of Deuteronomy. This Constitution operated so successfully that it was adopted by Rhode Island. When the colonies became independent states, they were the only two which had constitutional documents.

It is imperative to keep in mind the Declaration is dealing with a foundational base of principles on which this nation would be built, not merely interpreting an existing document. The resulting Declaration of Independence cannot be abolished, amended, or adulterated. It can only be abolished by the people adopting a new form of government.

The conclusive and corroborative definitions utilized by the Founders set out in Blackstone's Commentaries on the Laws,[7] are only refuted by denying the existence of God.

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[7] Introduced in 1766 was invoked as an authority in the writings of James Kent, James Wilson, Fisher Amos, Joseph Story, John Adams, Henry Lawrence, Thomas Jefferson, James Madison, James Otis, etc.

Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the LAWS OF NATURE AND OF NATIONS. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. This will of his Maker is called the LAW OF NATURE. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

This LAW OF NATURE, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this;. . . . He has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept.

> These are the eternal, immutable laws of good and evil. . . He has . . . so inseparably interwoven the laws of eternal Justice with the happiness of each individual, that the latter cannot be obtained but by observing the former . . . the doctrines thus delivered we called the revealed or divine law, and are to be found only in the Holy Scriptures . . . upon these two foundations, the law of nature and the law of revelation, depend all of human laws; that is to say no human laws should be suffered to contradict these.

Locke recorded the same truth:

> The Law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must . . . . be conformable to the Law of Nature, i.e. to the will of God.[8]

Richard Hooker, a favorite of Locke and the founding fathers, asserted that the Law of Nature came from the Scripture which was filled with the Laws of Nature.[9]

The Founders' writings demonstrate their conclusive adoption of the principles of Nature's Law.

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[8] John Locke, *Two Treaties*, Book II, p. 285, Chapter XI, §135

[9] *The Works of That Learned and Judicious Divine, Mr. Richard Hooker* Vol. I pp, 148, 207, 230, 427.

> All [laws], however, may be arranged in two different classes. (1) Divine. (2) Human .... But it should always be remembered that this law, natural or revealed, made for man or for nations, flows from the same Divine source: it is the law of God .... Human law must rest its authority ultimately upon the authority of that law which is Divine.[10]
>
> [T]he law .... dictated by God Himself is, of course, superior in obligation to any other. It is binding all over the globe, in all countries, and at all times. No human laws are of any validity if contrary to this.[11] (Alexander Hamilton)

John Jay, first Chief Justice of the Supreme Court, said "... Natural law was given by the Sovereign of the universe to all mankind."[12] Zephaniah Swift who wrote America's first law text agreed stating: "The ... Supreme Deity .... [Gave] those general and immutable laws that will regulate their operation through the

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[10] James Wilson, *The Works of the Honorable James Wilson*, Bird Wilson, Editor (Philadelphia: Lorenzo Press, 1804) Vol. 1, pp. 103-105, "Of the General Principles of Law and Obligation."

[11] Alexander Hamilton, *The Papers of Alexander Hamilton*, Herald C.Syrett, editor (New York: Columbia University press, 1961) Vol. 1 p. 87, p. 87, Feb 23, 1875, quoting William Blackstone, Commentaries on the Law of England

[12] John Jay, *The Life of John Jay.*, William J., Editor (New York: J& J. Harper, 1833), Vol. II, p. 385.

endless ages of eternity . . . . are denominated the laws of nature."[13] Samuel Adams contributed: All men . . . . are equally bound by the laws of nature, or to speak more properly, the laws of the Creator.[14] Noah Webster commented that the ". . . 'law of nature' is a rule of conduct . . . established by the Creator...denominated in Scripture . . ."[15]

In accord with that careful reasoning, it is not surprising that the first sentence of the Declaration of Independence went right to the jugular vein:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands, which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impelled them to the separation."

A single sentence introduced the most momentous event in modern history. The Declaration stated not a

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[13] Zephaniah Swift, A System of the Laws of the State of Connecticut (John Byrne, 1795), Vol. I, pp. 6-7.

[14] Samuel Adams, *The Writings of Samuel Adams*, Harry Cushing, Editor (New York: G.P. Putnam's Sons, 1908), Vol. IV, p. 356.

[15] Hamilton, *Papers*, Vol. I p. 87, February 23, 1775, quoting from Blackstone.

theory but a fact of law rooted in truths that it declared were "self-evident":

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness . . .

And in the last paragraph, the government appeals directly to God:

> We, therefore, the Representatives of the United States of America, in general Congress assembled, appealing to the supreme judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these Colonies, solemnly publish and declare that these United Colonies are, and of a right ought to be, free and independent States, . . . and for the support of this Declaration, with a firm reliance on the protection of Divine Providence, We mutually pledge to each other our lives, our fortunes, and our sacred honor.

The eight word phrase, "the Laws of Nature and of Nature's God" unequivocally established our value system of moral laws and principles that come from God, not man. They are to be recognized as the transcendent, universal, and unalterable moral code of the Creator God. The terms and the definition provided those terms at the time they were written are not subject to modification, interpretation, or change by the courts or government.

"Moral law" cannot be the product of the political or judicial process. If that is attempted, then all is relative. There is no right or wrong; indeed, as a matter of fact, there is no law. Cicero put it this way:

> But the most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations . . . What of the many deadly, the many pestilential statutes which nations put in force? They no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskillful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physicians' prescriptions; neither in a nation can a statute of any sort be called a law, even though the nation, in spite of being a ruinous regulation has accepted it . . . (Ibid. pp134-135)

Cicero asserts that law must be measured against God's law. Justice cannot be expected from an arbitrary law which is in violation of the principles of the laws of nature or the laws of the Creator.

> If the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace. But if so great a power belongs to the decisions and decrees of fools that the laws of Nature can be changed by their votes, then why do they not ordain that what is bad and baneful shall be considered good and salutary? Or, if a law can make Justice Injustice, can it not also made good out of bad? (Ibid. pp134-135)

The Declaration and the Constitution have been continuously recognized as one harmonious legal document. Former President John Quincy Adams in a speech delivered to the New York Historical Society on April 30, 1839 as precedent for the contention of Amici:

> "The Declaration was America's charter . . . the act [Constitution] . . . forming with it one entire system of national government . . . All this is by the Laws of Nature and of Nature's God, which of course presuppose the existence of a God , the moral ruler of the universe in a rule of right and wrong, of just and unjust, binding upon men, preceding all institutions of human society and of government . . . now the virtue which had been infused into the Constitution of the United States, and was to give to it its vital existence, the stability and duration to which it was destined, was no other than the concretion of

> those abstract principles which had been first proclaimed in the Declaration of Independence-namely, the self-evident truths of the natural and unalienable rights of man . . . always subordinate to . . . . the Supreme Ruler of the universe . . . . that was the platform upon which the Constitution of United States had been erected . . . consisted in its conformity to the principles proclaimed in the Declaration of Independence. . . ."[16]

In even more precise language echoing the fact that the Declaration is foundational, President Lincoln after reciting the provisions of the Declaration stated the same obvious conclusion:

> . . . . They erected a beacon to guide their children, and their children's children, [T]hey established these great self-evident truths that . . . . their posterity might look up again to the Declaration of Independence and take courage to renew that battle which their fathers began, *so that truth and justice and mercy and all the humane and Christian virtues might not be extinguished from the land. . . .*[17] (Emphasis supplied)

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[16] *America's Rule of Law* by Robert C. Cannada; published, National Lawyers Association Foundation (2001).

[17] Abraham Lincoln, The Works of Abraham Lincoln: Speeches and Debates, John H. Clifford, Editor (New York: the University Society Inc., 1908), Vol. III, pp. 126-127, August 17, 1858.

Justice Jackson of the United States Supreme Court at the Nuremberg trials in Germany against the Nazis emphatically stated that there is a higher authority than the law of man.[18]

An opinion of this court nearly 50 years ago expressed the same conclusion; Justice Douglas in *McGowan v. State of Maryland*, 366 U. S. 420, 81 S.Ct. 1218 (1961) stated:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration stated the now familiar theme: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The enabling act of Hawaii in 1961 required that their Constitution must be: ". . . republican in form and in conformity with the Constitution of the United

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[18] It is suggested the court carefully review the evidence and arguments of the Nuremberg trial. It demonstrates the Nazis goal of capturing the media and the courts, the minds of the youth, and the attempt to destroy Christianity..

States and the principles of the Declaration of Independence . . ." [See State of Hawaii, Pub. L. No. 86-3, 73 Stat. 4 (1959)][19]

The Northwest Ordinance — adopted July 13, 1787 by the United States in Congress assembled — provided in Article Third, "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged . . ."[20] [21]

The Founders deliberately created a "two tier" governmental structure. Truncating the argument; (1) The Declaration did not create man's rights, but simply acknowledged the truth that man's rights and moral laws come from the Creator God; and (2) The Constitution did not create rights, but was merely the "political process," to govern and protect those rights.

The judiciary is under oath to honor the "moral laws" of the Creator God as recognized in the Declaration as superior to human reason or any negating interpretation of the Constitution.

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[19] This actually applies to every state.

[20] It is specifically to be noted that this was adopted the same week that Congress was completing the draft of the First Amendment. The ordinance was reenacted in 1789 at the time the Bill of Rights was sent to the states for approval.

[21] *See Meyer v. United States*, 272 U.S. 52, 174-175 (1926).

Prophesying the impending immoral cauldron into which the United States was descending by reason of decisions of this Court and the extraction of God from our society, forty-two years ago the learned and perceptive Clarence E. Manion, Dean of the University of Notre Dame law school[22] in his Manion Forum of July 2, 1967 in the article "Stand up and Be Counted," stated:

> Our present day United States is neither the legal nor the logical development of what was so bravely brought forth upon this continent 191 years ago. What we now call the United States of America is traveling under an assumed name. The only connection between this Nation now and a great 1776 birth certificate is a purely sentimental attachment that serves merely to garnish the public speeches of hypocritical politicians . . . God the author of our liberty, is said to be dead . . . Today a copy of our Declaration of Independence is hard to find and rarely read when and if after it is discovered. That, too, is unfortunate, because every carefully considered sentence of this document is richly rewarding.

The Founders warned that constructing law from human reason and aborting the principles of the Declaration was actually courting the judgment of God. Lincoln asked was the Civil War God's judgment. Do

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[22] See also Manion, *The Natural Law Philosophy of the Founding Fathers* in University of Notre Dame Natural Law Institute Proceedings I (1949).

todays events carry such a warning?[23] The imperative of eternity echoed in the Founders' warnings:

> President Thomas Jefferson said: "I tremble for my country when I reflect that God is just: His justice cannot sleep forever."[24]
>
> George Mason, the father of the Bill of Rights, exclaimed: "As nations cannot be rewarded or punished in the next world, so they must be in this. By an inevitable chain of causes and effects, Providence punishes national sins by national calamities."[25]

Speaking before the Massachusetts Legislature in 1791, Chandler Robbins declared:

> "The Supreme Governor of the World rewards or punishes nations and civil communities only in this life . . . . Political bodies are but the creatures of time. They have no existence as such but in the present State; consequently, are incapable of punishments or rewards in a

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[23] The Scripture sets out four warnings of God to a nation; the sword (war); famine (economic crisis and insecurity); wild beasts (violence, killings, destruction of family); disease (injuries from natural disaster, health problems, from violence).

[24] Thomas Jefferson, *Notes on State of Virginia* (Philadelphia: Matthew Cary, 1794), P. 237, Query XVIII.

[25] James Madison, *The Papers of James Madison*, Henry Gilpin, Editor (Washington: Langtree and O'Sullivan, 1840), Vol.III p. 1391, August 22, 1787.

> future. We can conceive no way in which the Divine Being shall therefore manifest the purity of His nature .... toward such societies but by rewarding or punishing them here, according to their public conduct.[26]

The author of *The 5000 Year Leap, Principles of Freedom 101*,[27] put it this way: "I believe that earlier generations in America made mistakes, but nothing comparable to the betrayal and abandonment of the present one. We must reverse this trend if we are to survive as a free nation."

How close the United States may be to the end of its national life as we have known it, or any individual's life, only God knows. The warning signs of moral decay, however, are all about us. In addition, we are confronted with a cloud of impending nuclear annihilation. In times past as noted in the last paragraph of the Declaration, God was the one to whom the Founders prayed in reality for protection when the nation was facing any peril or difficulty. Today , however, since the Declaration has been held unconstitutional, that option on the part of the government for protection is not permitted.

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[26] Chandler Robbins, *A Sermon Preached before His Excellency John Hancock, Governor et.al.* (Boston: Thomas Adams, 1791), p. 32.

[27] 1981 by W. Cleon Skousen; published by the *National Center for Constitutional Studies*, 30th printing March 2009.

THE TERMS USED IN THE DECLARATION DO NOT CONSTITUTE A RELIGION AND ARE NOT IN CONFLICT WITH THE FIRST AMENDMENT

The judicial branch of our government has incorrectly reasoned that America's foundational principles, as used in the Declaration, are in conflict with the First Amendment and the Declaration is, therefore, unenforceable.

The courts, under the deceptive guise of "religious freedom from the interference of government" starting with *Everson*, have created an atheistic nation. God is no longer recognized by the government as man's Creator[28] or the source of human rights and moral law.

This approach ignores the fact that if the Declaration can be amended or is otherwise subject to change, it absolutely cannot legally or logically be the source of any "unalienable rights." The product of such legal reasoning is an "alienable or qualified right," which is no rights at all, in stark contrast to the "unalienable rights" recognized in the Declaration.

God and His laws are not a religion. The term "religion" does not appear in the Declaration which simply establishes that our government is founded on the presupposition that God exists and from God come

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[28] Such content is denied instruction in our school system, rather we are required to teach the unscientific Marxist doctrine of evolution. By doing so we rob our young people of a hope for tomorrow.

our rights and moral laws. That presupposition under the law of non-contradiction provides the definition for the terms "religion, morality, and knowledge" used in the Northwest Ordinance of 1787.

Thus the founders established the general principle that "without religion the government of a free people cannot be maintained." The term "religion" as used in the First Amendment is not in conflict with that founding principle of law set forth in the Declaration or the term "religion and morality" as used in the Northwest ordinance of 1787.

Again truncating the discussion, the term "religion" in the First Amendment must be constitutionally attributed the meaning intended. It applied only to the individual's unrestricted personal right to select the faith or church of his choice, or to choose none or be an atheist if he desired. "Religion" as used in the First Amendment was not intended to and did not create a conflict with the Declaration.

To reach any other conclusion not only finds the Declaration to be unconstitutional, which the courts simply do not have the authority to do, or to set policy based upon their particular individual supposition. It clearly violates the law of non-contradiction of which the Founders were well aware.

Consequently, the government has not only the right but the responsibility to recognize God as our Creator and the absolute source of human rights.

From the Declaration in 1776 right on through the adoption of the Constitution and the subsequent amendments, the evidence clearly supports the founding principles of law contained in the Declaration; Congress approved a printing of the Bible; the use of the English Primer containing Scripture as the basis for instruction in schools; the McGuffey reader filled with God and the Scripture inundated our school classrooms to the extent that Pres. Lincoln proclaimed it was the "schoolmaster of the nation;" prayers were not ceremonial rhetoric, they were realistically to the Creator God; the display of the Ten Commandments; proclamations by the government for fasting and prayers; the recognition of God in Christmas, Easter, and Thanksgiving; crosses were placed upon military graves, and the list is endless.

On a military grave, the cross simply identifies this nation's recognition of God as contained in its founding law in the Declaration.

The display of a cross as a military symbol on graves is a part of our culture recognizing God as authorized in the Declaration. It exemplifies the fighting spirit of America to defend its liberty and faith in God.

As of the date this brief is written, 65 years ago in 1944 a battle royal was being waged in World War II in and around Anzio, Italy. The picture of the United States military cemetery at Anzio with the hundreds of crosses of fallen Americans killed in their fight to protect our freedom, is attached in the appendix. It represents only one of dozens of military cemeteries across Europe and England displaying over 140,000 such crosses for fallen Americans.

We do not apologize to any nation for the cost of precious American lives that were expended in protecting our freedom.

CONCLUSION

The days preceding the drafting of the Declaration of Independence were sobering days. The shadow of death hung over the colonists.

Today we live in an even more sobering day. No matter how optimistic the Justices of this bench may be, there is a foreboding in the air. There is a foreboding that one can actually feel. This world is spinning toward an apex with madmen in control of awesome weapons that can create total devastation.

It is no accident this case comes to the Supreme Court for such a time as this. It is contended this court has the duty of their oath to declare that the law contained in the Declaration is constitutional and not in conflict with the First Amendment and controls its interpretation. Any case law past or present which finds to the contrary either in fact, implication, or otherwise is simply a nullity.

With that closing thought, it is extremely relevant in these days of controversy to remember the remarks of Philip Dormer Stanhope, Fourth Earl of Chesterfield, (Miscellaneous Works, volume IV, 1779) who stated:

> "Let us consider that arbitrary power has seldom or never been introduced into any country at once. It must be introduced by slow

> degrees, and as it were step-by-step, less the people should see it approach. The barriers and fences of the peoples' liberty must be plucked one by one, and some plausible pretenses must be found for removing or hoodwinking, one after another, those sentries who are posted by the constitution of a free country for warning the people of their danger. When these preparatory steps are once made, that people may then indeed, with regret, see slavery and arbitrary power making long strides over their land; but it will be too late to think of preventing or avoiding the impending ruin."

Amici therefore respectfully prays that the opinion of the Ninth Circuit be reversed as violating the provisions of the Declaration and, therefore, in violation of the Constitution. Further that the opinion clearly state that the Declaration of Independence is America's rule of law and to be followed in the interpretation of the Constitution or its amendments.

Respectfully submitted,

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APPENDIX

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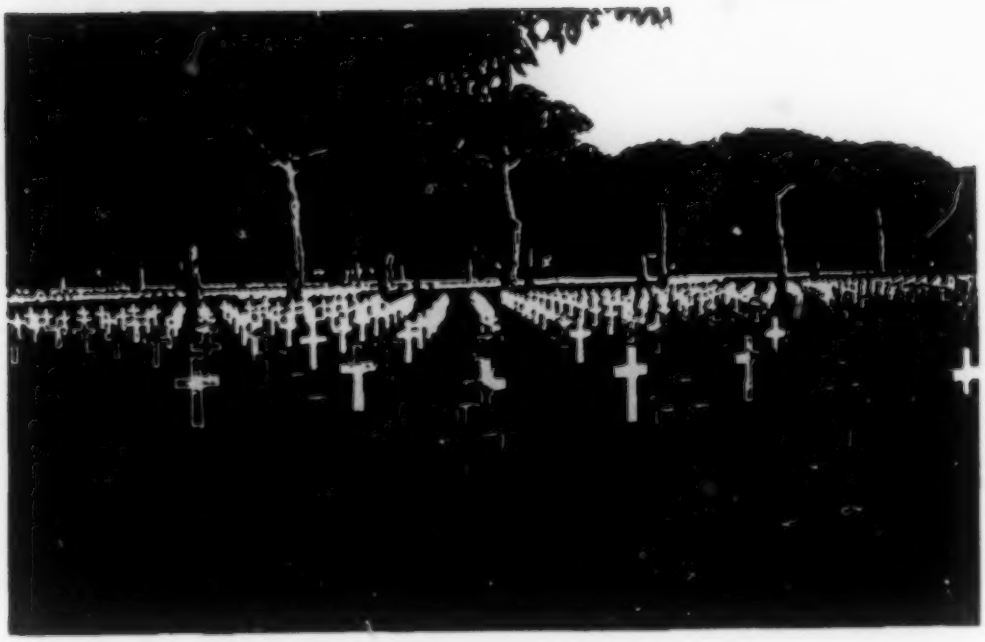

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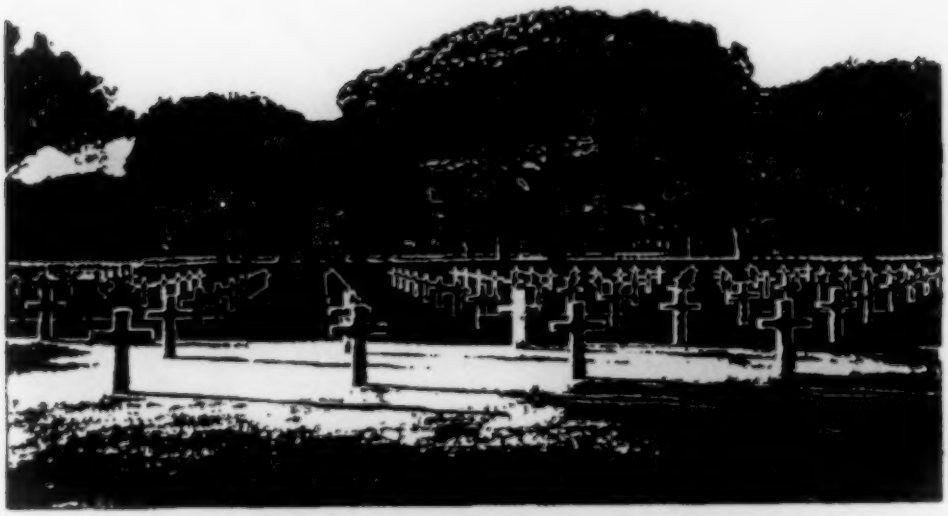
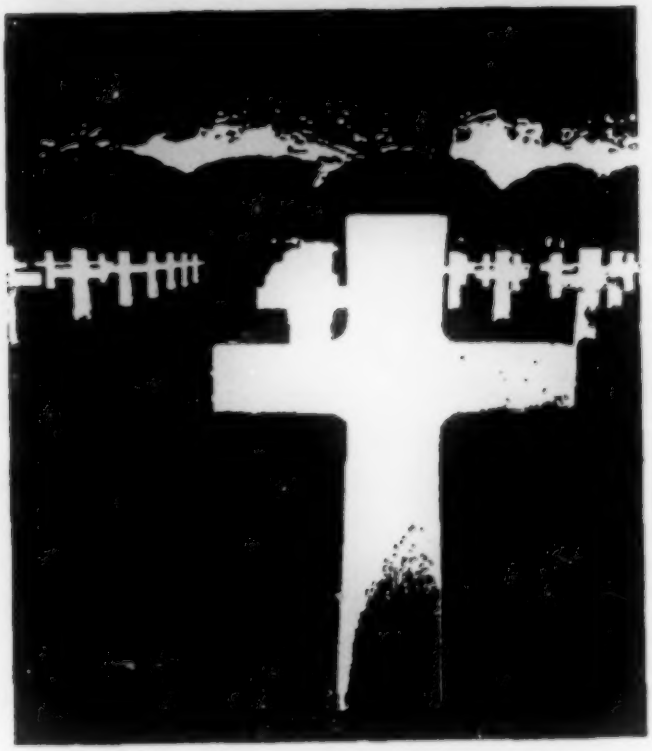
APPENDIX B—CEMETARY 2





AMICUS CURIAE BRIEF

130 (24)

No. 08-472

FILED
JUN 5 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY
OF THE INTERIOR, ET AL.,

Petitioners,

v.

FRANK BUONO,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICUS CURIAE OF FIDELIS CENTER FOR LAW AND POLICY AND CATHOLICVOTE.ORG IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

Fidelis Center For Law & Policy ("Fidelis") is a not-for-profit public interest organization that is dedicated to the sanctity of life, religious liberty, marriage and family. In an effort to protect and promote these fundamental rights and institutions, Fidelis engages in public education and public interest litigation.

Fidelis submits this brief on behalf of itself and those who support CatholicVote.org, a nonpartisan voter education program devoted to building a Culture-of-Life, a culture that embodies in its law respect for the fundamental rights and institutions described above. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religious tradition.

Fidelis and CatholicVote.org believe that our great nation arose from the fruitful interplay of religion and natural law philosophy that are at the heart of the Judeo-Christian tradition and the founding of this nation. Throughout our national experience religious wisdom, as mediated through the Judeo-Christian tradition, has informed our civil society, inspired civic virtue, and promoted the common good.

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[1] Counsel of Record were given notice and did consent to the filing of this brief. No counsel for any party participated in any way to the drafting of this brief and no party contributed funds for the brief.

We believe that the public recognition of religion is an appropriate tribute to the important contribution that religion has made to our national experience. For these reasons Fidelis and Catholic Vote believe that this Supreme Court of the United States should hold that the public recognition of religion at issue in this case does not create an injury cognizable under the religious liberty provision of the First Amendment.

REASON FOR GRANTING THE PETITION

This Court has granted certiorari to consider whether the Respondent, Frank Buono, has standing to advance a claim that the display of a Latin Cross placed on public land to commemorate soldiers who gave their lives for this country in World War I violates the Establishment Clause. More specifically, this Court will decide whether Buono, who has no objection to the public display of a cross, has standing to challenge its display because others cannot display symbols in the public park where the cross has been placed. For the reasons stated by the petitioner and other amici, this amicus agrees that Buono does not have standing.

Fidelis Center for Law & Policy writes separately to urge this Court to use this case to correct a fundamental flaw in Establishment Clause jurisprudence that is inextricably interwoven with the standing issue this court must address, i.e. the "endorsement" test. In the courts below, Buono was found to have

standing based on precedent from this Court lending credence to a claim that the display of a cross on public property is an "endorsement" of religion that violates the Establishment Clause. It is this flawed interpretation of the Establishment Clause that makes mere offense at the public recognition of religion an injury that is cognizable under the First Amendment. It is the recognition of this "offense" as a cognizable injury that provides the basis for the injury in fact needed to satisfy the standing required under Article III.

Because this Court must necessarily address the injury in fact needed to advance an Establishment Clause claim in order to determine if Buono has standing, it should take this opportunity to reconsider whether dismay arising from the display of a religious symbol on public property can support an injury cognizable under the Establishment Clause. In doing so, this Court should squarely hold that an objection to display of a religious symbol on public property does not create a cognizable injury in fact sufficient to support the standing needed to advance a claim under the Establishment Clause. The Establishment Clause was meant to protect the free exercise of religion; it was not meant to insulate citizens from mere discomfort at the sight of a religious symbol. To hold that the display of a religious symbol gives rise to a cognizable injury under the Establishment Clause trivializes, and ultimately undermines,

the important liberty interest that provision was intended to protect.

This Court Should Make Plain That Offense Arising From The Public Recognition Of Religion Of The Kind At Issue Here Creates No Injury Cognizable Under The Establishment Provision Of The First Amendment.

In connection with its consideration of whether Buono has an injury in fact that is cognizable under the Establishment provision of the First Amendment, this Court should make plain that mere feelings of personal offense or discomfort are insufficient to support standing for an Establishment Clause claim. In so holding, this Court will bring standing under the Establishment Clause back to the principled core of its standing jurisprudence under the First Amendment and cut off a highly problematic overextension of its standing doctrine that has produced confusion and inconsistency.

A brief review of the overarching trajectory of this Court's precedent under the Establishment Clause supports the request made here. This court's early Establishment Clause cases arose from claims that civil authority was being used to coerce support for religion. In *Bradfield v. Roberts*, 175 U.S. 291, 293-94 (1899), this court rejected such a taxpayer's claim holding that merely giving financial assistance to a hospital run by a particular religious denomination did not violate the Establishment Clause. In so

holding this Court emphasized that the hospital was conducting completely secular operations and tax dollars were not being used to support religious programs or religious beliefs so that government had not coerced support for religion.

Similarly in *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court entertained a taxpayer's claim that New Jersey violated the First Amendment prohibition of laws respecting an establishment of religion when it used tax-raised funds to pay the bus fares of parochial school pupils. The Court found that the program, which reimbursed parents for costs incurred to transport their children, did not amount to a use of the taxing power to compel support for the parochial schools. As a result this Court held that the program did not violate the First Amendment. *Id.* at 18.

Although *Bradfield* and *Everson* decided taxpayer claims on the merits, they did not specifically address the injury in fact required to advance a taxpayer claim under the Establishment Clause. In both cases, the Court took for granted that the Establishment Clause prohibited the use of civil authority to compel support for religion.

The Court confirmed this understanding of the Establishment Clause and its implicit consequences for standing in *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast,* this Court held that because the Establishment Clause was intended to operate as a specific limitation on the tax-and-spend power a taxpayer who

alleged that tax monies were spent to support religion did state a claim cognizable under the Establishment Clause. In so holding, this Court explained that the Establishment Clause was meant to prohibit coerced support for religion and that the coerced support for religion was the injury in fact that provided standing under the First Amendment. In subsequent cases challenging the use of public funds to support religion, the Court often assumed and sometimes explicitly held that standing was premised on the injury in fact recognized in *Flast*, which authorized taxpayer standing. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952); *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988). *See Tilton v. Richardson*, 403 U.S. 672, 665-88 (1971); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 744 (1976); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789 (1973); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

On the other end of the spectrum, the taxpayer standing cases had also provided an opportunity for this Court to define the sort of injury that is *not cognizable* under the Establishment Clause. In *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), plaintiffs challenged the government's transfer of public property to a religious group. This court held that the plaintiffs did not suffer any actual harm and therefore did not have standing. This Court explained that the plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional

error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees [and] that is not an injury sufficient to confer standing." *Id.* at 464.

More recently in *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007), this court confirmed the main thrust of its taxpayer standing cases when it held that plaintiffs who opposed the President's faith-based community initiatives based on their stated opposition to government endorsement of religion and their sense that the presidential initiative constituted such an endorsement. In holding that the plaintiffs could not demonstrate the concrete injury in fact needed to support taxpayer standing, the Court relied upon its earlier decision in *Doremus v. Board of Education*, 342 U.S. 429 (1952), where this Court found a state taxpayer lacked standing because he not show that funds were expended to support religious exercises and absent proof of the "direct dollars-and-cents injury" cognizable under the Establishment Clause, the plaintiff's injury reduced to a (non-cognizable) "religious difference." *Hein*, 551 U.S. at 439 (quoting *Doremus*, 342 U.S. at 435).

These cases mark out the main line of this Court's Establishment Clause precedent. By means of these decisions the Court had defined the injury cognizable under the Establishment Clause with an overarching consistency and crafted a stable body of standing precedent that was capable of principled and consistent application. At one end of the continuum it was clear that government could not coerce

support for religion and a program in which government did so gave rise to an injury cognizable under the Establishment Clause, the kind of concrete injury in fact needed to support standing. On the other end of the continuum this Court had made plain that mere offense at perceived government support for religion was not cognizable under the Establishment Clause, or put differently, was an insufficient injury in fact to support standing.

But beginning with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), this court lent credence to the far-fetched notion that a feeling of discomfort occasioned by a public recognition of religion was cognizable under the Establishment Clause and therefore constituted a sufficient injury in fact to support standing. In that case the Court relied upon the idea that mere public recognition of religion could give rise to a cognizable injury under the Establishment Clause because "endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 625. It is this notion of endorsement which provides the basis for Buono's standing in this case. Later cases applying this notion produce results that must candidly be described as mystifying. *See Van Orden v. Perry*, 545 U.S. 677 (2005); *cf. McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005).

Fidelis respectfully submits that the endorsement test represents an unthinking and fatally flawed overextension of this Court's First Amendment standing precedent. For one thing, this Court must see that the very idea that perceived endorsement creates an injury cognizable under the Establishment Clause is inconsistent with decisions wherein this Court has itself acknowledged on any number of occasions the role of religion in our national experience and has indicated that the public recognition of religion does not violate the Establishment Clause.[2] Indeed, it defies common sense to suggest that a constitution which by its terms specifically protects the free exercise of religion is unconstitutional by virtue of "endorsement" of religion.

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[2] *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963); *Engel v. Vitale*, 370 U.S. 421, 434 (1962); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland*, 366 U.S. 420, 431 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 30-33 (2004) (giving several instances of public recognition of religion: George Washington using a Bible at his inauguration, the proclamation of Thanksgiving for being grateful to God, Lincoln mentioning the rights God gives, Woodrow Wilson asking for a declaration of war saying, "God help her," Theodore Roosevelt asking for the blessing of God while taking the oath of office, Dwight D. Eisenhower addressing soldiers asking for God's blessing upon them, "In God We Trust" on currency and Court Marshalls asserting, "God save the United States and this honorable Court.").

In addition, the fanciful notion that offense arising from a symbolic recognition of religion by government gives rise to an injury cognizable under the Establishment Clause is inconsistent with this Court's broader standing jurisprudence under the First Amendment. Just as this Court has recognized that offense of the speech of others is not cognizable under the First Amendment, *see Cohen v. Cal.*, 403 U.S. 15, 22 (1971), this Court has recognized that disagreements with government speech are a daily part of life and do not give rise to a cognizable injury. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (Government's placement of military recruiters at school was not found a violation of the constitution despite offense taken by faculty it did not "sufficiently interfere" with First Amendment rights of faculty or schools). Even more to the point given that the religious symbol here was placed by private citizens, this Court has refused to find a cognizable injury based on offense at the speech of others, *Tex. v. Johnson*, 491 U.S. 397, 408 (1989), and it has held that government has no interest in protecting the religious sensibilities of its citizens. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). Taken together, these cases show that a feeling of offense arising from the public recognition of religion should not be deemed cognizable under the Establishment Clause and should be insufficient to confer the concrete injury in fact needed to support standing. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (where a father could

not sue on behalf of his daughter, his offense was not sufficient for standing), *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Precisely because the notion that offense at public recognition of religion gives rise to a cognizable injury is so far removed from the gravamen of this Court's First Amendment standing precedent, the endorsement test has produced bizarre and inconsistent results belying any notion that it is a principled rule of law. As Judge Easterbrook has noted, efforts to decide whether a given governmental recognition of religion gives rise to a cognizable injury has forced courts to essay opinions more commonly associated with an interior decorator than Article III judges. *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J. dissenting). The very notion that whether public recognition of religion is unconstitutional turns on color of trees around a religious symbol or whether a sign says "Glory to God" or "Happy Holidays" is both bizarre and unbecoming given the history of our nation and the important interest that the religious liberty provision of the First Amendment is designed to protect. Judge Easterbrook is not alone. *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part) (saying that the endorsement test "threatens to trivialize constitutional analysis"), *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (O'Scannlain, concurring in judgment but disagreeing with the legal analysis and the endorsement test).

For these same reasons, leading academics have criticized the endorsement test. Jesse H. Choper has criticized the endorsement test and argued that

> absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as well as improperly authorize official injury to religious liberty.

Symposium, Beyond Separatism: Church and State: The Endorsement Test: Its Status and Desirability, 18 J. L. & Politics 499, 521.

Likewise, Steven D. Smith has noted that the term "outsider" represents nothing more than a person who disagrees with what the government is saying or doing and although there will always be someone who disagrees with a governmental initiative, that does not mean that government cannot act. The reason is simple, the citizen who disagrees is not injured in any meaningful sense because this "does not prevent such citizens from voting, running for office, advocating their own positions, serving on juries, or claiming the full panoply of rights extended by state and federal law, those citizens are considered to be fully protected in their freedoms of belief and expression." *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the*

"No Endorsement" Test, 86 Mich. L. Rev. 266, 310. Put another way, the dismayed citizen does not have the kind of concrete injury in fact needed to support standing because there is no meaningful interference with the individual citizen's First Amendment rights.

In the same vein, William P. Marshall has noted that,

> one cannot easily maintain the assertion that offensive governmental action is unconstitutional. Much of what the government does is offensive . . . governments erect monuments to war without regard to the sensibilities of pacifists . . . states . . . incorporate Confederate symbols . . . the symbol of the Confederacy is an obvious affront to blacks. Memorials, dedicated to the Unknown Child, may offend the sensibilities of pro-choice advocates. All of this occurs without running afoul of the Constitution.

66 Ind. L.J. 351, 359. Citing *Joseph Burstyn, Inc., supra*, Marshall asserts that if "the first amendment's speech clause prohibits the state from acting to protect religious sensibilities . . . it would be inconsistent for the first amendment's establishment clause to simultaneously require that religious sensibilities be protected." 66 Ind. L.J. 351, 362.

Finally, Michael W. McConnell has pointed out that the endorsement test is inconsistent with the idea that the government is supposed to accommodate religion. 59 U. Chi. L. Rev. 115, 154. As McConnell notes, "the general rule is that plaintiffs who

suffer no personal injury other than the psychological consequence presumably produced by observation of conduct with which one disagrees lack standing to sue." 59 U. Chi. L. Rev. 115, 165. The notion that the subjective, psychological dismay of a citizen who is offended by the public recognition of religion produces an injury cognizable under the Establishment Clause is so chimerical that McConnell described the endorsement test as, "nothing more than an application to the Religion Clauses of the principle: I know it when I see it." *Id.* at 148.

This Court should use this case to disavow the far-fetched notion that dismay arising from the public recognition of religion gives rise to an injury cognizable under the Establishment Clause, an injury in fact sufficient to support standing. The whole notion is inconsistent with the history of our nation, which has featured a wholly appropriate recognition of the importance that religious conviction plays in the lives of our citizens and our national experience. It is inconsistent with the text of the First Amendment, which specifically recognizes and protects the free exercise of religion. It lies far outside the main thrust of this Court's precedent under the Establishment Clause, which focused on coerced support for religion; and it is inconsistent with this Court's broader standing jurisprudence under the cognate provisions of the First Amendment, where offense taken at the speech of government or other citizens is simply not cognizable. Attempts to apply the notion have produced results that are bizarre and inconsistent; and learned commentators have demonstrated that the

idea is deeply flawed. This Court should use its elaboration of standing in this case to make plain that "offense" at the display of a religious symbol on public property does *not* give rise to an injury that is cognizable under the First Amendment.

CONCLUSION

From the beginning this Court has recognized that the prohibition on laws respecting an establishment of religion contained in the First Amendment was intended to prevent the civil authorities from coercing support for religion. At the same time, this Court has recognized that public recognition of religion does not violate the First Amendment. In these two complementary lines of cases this Court long recognized implicitly that any feeling of discomfort produced by the public recognition of religion was not cognizable under the Establishment Clause or, put another way, such discomfort did not give rise to a concrete injury in fact sufficient to support standing.

In the case at bar, this Court must necessarily determine whether Buono has standing to advance a claim based on the Establishment Clause that rests upon nothing more than his dismay that only one religious symbol is displayed on Sunrise Rock in the Mojave Desert National Preserve. In order to do so, this Court must address whether and how the public recognition of religion creates an injury cognizable under the Establishment Clause. This Court should

take this opportunity to make plain that any discomfort that may arise from the public recognition of religion is not cognizable under the Establishment Clause. In so doing this Court will confirm the gravamen of its precedent under the First Amendment and disavow a far-fetched notion that has proven incapable of the principled application that characterizes the rule of law.

Respectfully submitted,

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June 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 2009
OFFICE OF THE CLERK

No. 08-472

IN THE
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER HIGH-RANKING MILITARY OFFICIALS COLONEL DAVID ANTOON, BRIGADIER GENERAL ISRAEL DRAZIN, VICE-ADMIRAL BERNARD KAUDERER, COLONEL RICHARD L. KLASS, BRIGADIER GENERAL A.A. "TONY" VERRENGIA, AND COLONEL LAWRENCE B. WILKERSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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August 3, 2009

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INTEREST OF *AMICI CURIAE*[1]

Amici are former high-ranking officers of the United States military. They are deeply interested in this case because it has serious implications for the military's functioning, including its ability to accomplish its missions and its efforts to recruit the most qualified personnel possible. *Amici*'s judgments in this area are based upon many decades of first-hand experience, at a variety of levels, with the workings of our nation's military.

Colonel David Antoon graduated from the U.S. Air Force Academy, after which he became a C-130 aircraft commander and instructor pilot. Having participated in over one hundred tactical combat missions in Vietnam and Cambodia, he was awarded the Distinguished Flying Cross and three Air Medals. He spent twenty-five years on active duty, followed by many years as a commercial pilot. He also graduated from Air Command and Staff College as well as Air War College, and obtained two master's degrees (MBA Trinity University and MS Air Force Institute of Technology (Operations Research)).

Brigadier General Israel Drazin, an ordained rabbi, entered Army Active Duty at age twenty-one as the youngest U.S. Chaplain ever to serve on active duty. In his thirty-one years of military service, he

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

was at the forefront of efforts to foster both religious accommodation and religious tolerance within the armed services. A trained lawyer, he was instrumental in successfully defending the Army Chaplaincy against Establishment Clause attacks in the 1980s. As the first Jewish person to serve as Assistant Chief of Chaplains for the U.S. Army, he revolutionized the role of military chaplains, making them responsible for the free exercise rights of all military personnel and requiring them to provide for the spiritual needs of all servicemembers, regardless of their religious beliefs.

Vice-Admiral Bernard Kauderer was commander of the Submarine Force, U.S. Atlantic Fleet (1983-86), and the Submarine Force, U.S. Pacific Fleet (1981-83). During his thirty-three-year military career, he also served as Deputy Director of Research, Development, Test and Evaluation on the staff of the Chief of Naval Operations (1979-81). Following his retirement from the Navy, Vice-Admiral Kauderer was instrumental in a successful effort to build the first Jewish chapel at the United States Naval Academy.

Colonel Richard L. Klass, U.S. Air Force (retired), is a distinguished graduate of the U.S. Air Force Academy (1962) and the National War College (1977). He served in the Office of the Under Secretary of Defense (Policy) (1977-1980) and U.S. Air Forces Europe (1972-76). He also served in the Executive Office of the President as a White House Fellow (1970-72). As a Forward Air Controller in Vietnam, Colonel Klass logged over five hundred combat hours during the course of over two hundred air missions. He was awarded the Silver Star,

Distinguished Flying Cross, 11 Air Medals, and a Purple Heart. Colonel Klass holds two master's degrees from Oxford University, where he attended as a Rhodes Scholar.

Brigadier General A.A. "Tony" Verrengia was a pioneer in the manned spaceflight programs of NASA for over twenty-five years, including holding key staff positions in the Gemini, Apollo, Skylab, and Space Shuttle program management offices. In 1983 he served on the interagency taskforce that obtained President Reagan's approval to proceed with development of the International Space Station. He is a graduate of the Air Command and Staff School and of the Air War College, and is an Honor Graduate of the Industrial College of the Armed Forces.

Colonel Lawrence B. Wilkerson served as chief of staff to Secretary of State Colin Powell (2002-05) and in the State Department's Office of Policy Planning as the staff member responsible for East Asian political, military, and legislative affairs (2001-02). Before serving at the State Department, Colonel Wilkerson served thirty-one years in the U.S. Army, including as Director and Deputy Director of the U.S. Marine Corps War College at Quantico, Virginia (1993-97), Special Assistant to then-General Colin Powell when he was Chairman of the Joint Chiefs of Staff (1989-93), and Deputy Executive Officer to General Powell when he commanded the U.S. Army Forces Command (1989).

SUMMARY OF ARGUMENT

The United States military is one of the most racially and culturally diverse institutions in the

nation. This diversity extends to religion, with almost a third of servicemembers identifying themselves as non-Christians. This is no new phenomenon; members of minority faiths have served with distinction in every war in United States history, including World War I.

Recognizing the important past and future contributions by people of minority faiths to the United States military effort, *amici* believe that the cross in the Mojave Desert – one of a small number of a national war memorials – has the impermissible effect of communicating government endorsement of Christianity. Unlike other war memorials that incorporate secular imagery or religious imagery from a variety of faiths, the cross conveys the message that the military values the sacrifices of Christian war dead over those of servicemembers from other faith traditions.

That is not only a clear constitutional violation, but is also harmful to the military as an institution, adding to social divisiveness in the very way that the Establishment Clause is intended to avoid. Based on many decades of experience in the military, *amici* believe that the message sent by a war memorial like the cross undermines unit cohesion – which is absolutely critical to the military's ability to function in combat, as well as in other settings – by fostering a military culture that is intolerant of religious difference and that causes minority populations to feel excluded. In addition, that message undermines efforts by the military to reach out to members of minority faiths, and to recruit and retain them to serve as part of the nation's armed forces, even though such individuals often possess skills (such as

foreign language proficiency) that are essential to the military's mission.

ARGUMENT

I. THE MILITARY IS A HIGHLY RELIGIOUSLY DIVERSE INSTITUTION.

The United States military is a strikingly religiously diverse institution. As of 2001, 35 percent of military personnel were Protestant, 22 percent were Catholic or Orthodox, 11 percent belonged to another Christian denomination – and 21 percent were atheists or reported no religion, while another 11 percent subscribed to another faith or declined to provide information about their religious beliefs. *See* David R. Segal & Mady W. Segal, *America's Military Population*, Population Bull., Dec. 2004, at 25-26. These last two figures were only 14 percent and 2 percent for the general adult population. *See id.* And as of 2005, the military maintained a list of *one hundred* religious denominations or groups to which its members belonged. *See* Jason G. Riley, *For God or Country? Religious Tensions Within the United States Military* 15 (Dec. 2006) (unpublished manuscript), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462635& Location=U2&doc=GetTRDoc.pdf.

In absolute numbers, there were at least 4,392 Buddhists, 704 Hindus, 4,004 Jews, and 3,597 Muslims in the military in 2005, many serving in Afghanistan, Iraq, and other theaters. *See id.* at 17.[2]

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[2] Other estimates of the numbers of religious minorities in the military are even higher. *See, e.g.*, Mike Barber, *Muslims in the U.S. Military Are as Loyal as Any, Chaplain Says*, Seattle

Former Secretary of State Colin Powell has publicly highlighted the religious diversity of the U.S. military, singling out the service of Kareem Khan, a Muslim corporal who was killed in a bomb explosion in Baquba, Iraq, in August 1997. Corporal Khan's remains are now interred in Arlington National Cemetery, and the army has recognized his service with the Bronze Star and the Purple Heart. *See More on the Soldier Kareem R. Khan*, The Lede: The New York Times News Blog, Oct. 19, 2008, *available at* http://thelede.blogs.nytimes.com/2008/10/19/more-on-the-soldier-kareem-r-khan/; *see also* Linda D. Kozaryn, *Muslim Troops Highlight Nation's Diversity*, Am. Forces Press Serv., Jan. 26, 1999, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=42671.

The military's religious diversity is no new phenomenon. Jews, for example, have fought for the United States in every major conflict in its history. *See* Seymour Brody, *350 Year Commemoration of Jews in America's Military* 35 (2004), *available at* http://www.nmajmh.org/americanJewish/docs/350th%20book.pdf. More than 250,000 Jews fought in World War I alone, of whom over 3,500 were killed, 12,000 were wounded, and 1,100 received decorations for bravery. *See id.* at 17. Indeed, it was a Jewish barber from the Bronx, Private Abraham Krotoshinksy, who earned the title of "New York's Greatest Hero of the War" for leading the mission to rescue the famous Lost Battalion of the 77th

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Post-Intelligencer, Oct. 20, 2001, *available at* http://www.seattlepi.com/attack/43546_chaplains20.shtml (estimates of Muslims in military go as high as 15,000).

Division. *See* Christopher M. Sterba, *Good Americans: Italian and Jewish Immigrants During the First World War* 181 (2003).

Other religious minorities have also provided distinguished and honorable service. The most decorated unit in American military history was composed of 4,500 Japanese-Americans who subscribed to faiths including Buddhism and Shinto as well as Christianity. This unit, the 100th Infantry Battalion, fought eight major campaigns during World War II and was instrumental in liberating the Dachau Concentration Camp. The battalion claimed over 18,000 individual decorations for bravery, 9,500 Purple Hearts, and seven Presidential Distinguished Unit Citations. *See* Robert Asahina, *Just Americans: How Japanese Americans Won a War at Home and Abroad* 75 (2007); Nat'l Japanese American Historical Soc'y, *Research on 110th/442nd Regimental Combat Team, available at* http://www.nikkeiheritage.org/research/442.html (last visited July 31, 2009).

Today, it is the military's official policy that its members' many different faiths all be equally respected. This policy is reflected in the core principles that guide the military's operations. *See, e.g.*, Defense Equal Opportunity Management Institute Guiding Principles, http://www.deomi.org/AboutDEOMI/GuidingPrinciples.cfm (last visited July 30, 2009) (military's guiding principles include "Respect – for the infinite dignity and worth of all individuals" and "Diversity – an understanding that our strengths derive from our differences as well as our shared values, goals and ethics"); *United States Air Force – Core Values* (Jan.

1, 1997), *available at* http://www.peterson.af.mil/shared/media/documents/AFD-090212-058.pdf (setting forth "Core Values," including "[r]eligious toleration," that "remind us what it takes to get the mission done" and are "the glue that unifies the force and ties us to the great warriors and public servants of the past," and stating that "[m]ilitary professionals must remember that religious choice is a matter of individual conscience" and that "[p]rofessionals, and especially commanders, must not take it upon themselves to change or coercively influence the religious views of subordinates"). It is also reflected in more specific directives that recognize and honor individual servicemembers' varying backgrounds and beliefs. *See, e.g.*, Dep't of Veterans Affairs, General Information Sheet 40-1330, www.va.gov/vaforms/va/pdf/VA40-1330.pdf (last visited July 30, 2009) (allowing members of the military to choose a headstone featuring one of more than three dozen "authorized emblems," including symbols of Islam, Judaism, Buddhism, and other faiths); News Release, Dep't of Defense, Dep't of Defense Identifies Army Casualties (Aug. 9, 2007), *available at* http://www.arlingtoncemetery.net/krkhan.htm (including photo of Kareem Khan's gravestone at Arlington National Cemetery, which features a Muslim star and crescent).

II. THE MEMORIAL AT ISSUE IN THIS CASE CONVEYS AN IMPERMISSIBLE MESSAGE OF RELIGIOUS ENDORSEMENT.

One of the mainstays of Establishment Clause doctrine is that governmental displays are unconstitutional if they convey a message of religious

endorsement. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); *see also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673, 698 (2002) ("[T]he Court has now fully adopted the endorsement test . . . ."). The message conveyed by a display is determined by analyzing "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-43 (2004) (O'Connor, J., concurring in the judgment).[3]

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[3] *Amici* agree with Respondent's argument that the issue of whether there is an Establishment Clause violation in this case is *res judicata*, having been conclusively determined by a final judgment that cannot be revisited as part of this collateral enforcement proceeding. *See* Respondent's Br. at 9. *Amici* nevertheless address this issue, in the event that the Court rejects that argument (which it should not). *Amici*'s analysis is also relevant to the question of whether a land swap would be sufficient to cure the Establishment Clause violation here, including whether the designation of the display as a national memorial is sufficient to constitute ongoing government endorsement.

A. National Memorials Are Quintessential Examples Of Government Action Subject To Establishment Clause Limits.

Only government action, of course, is subject to Establishment Clause limits. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In this case, regardless of whether a land swap is carried out that ultimately locates the memorial at issue on a small plot of private property, there is nevertheless government action by virtue of Congress's designation of the Mojave cross as a national memorial. *See* Dep't of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278 (2001).

Such designations are exceedingly rare. There are currently only forty-nine structures whose public significance is sufficient to justify explicit legislative recognition as a national memorial. This list of national memorials includes, among others, the Washington Monument, the Lincoln Memorial, and the Vietnam Veterans Memorial — structures that have extraordinary meaning for current and former members of the military as well as for other citizens. *See* 16 U.S.C. § 431 note.

This Court made clear just last Term that memorials are an important mechanism through which governments communicate with the public. "Governments have long used monuments to speak to the public. . . . Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of

civic importance." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132-33 (2009); *see also id.* at 1133 (purpose of monument is typically "to convey some thought or instill some feeling in those who see the structure"). Designation of a structure as a national memorial is thus nothing less than a statement by the federal government – a way in which the government adopts and amplifies whatever message the memorial conveys to its observers.

Such designation has immediate practical consequences as well. The National Parks Service is statutorily required to exercise "supervision, management, and control" over national monuments, a category that includes national memorials. *See* 16 U.S.C. § 2. There is no exception to this requirement for monuments located on private land; indeed, the statute clearly contemplates monuments of that sort. *See id.* § 431 (discussing national memorials that "are situated upon a tract covered by a bona fide unperfected claim or held in private ownership"). Adding to the Service's maintenance obligations, Congress explicitly allocated funds for the Mojave cross's improvement, while also stipulating that federal officials will maintain their responsibilities for the cross even after the land transfer. *See* Pub. L. No. 107-117, § 8137(c), 115 Stat. at 2278-79 (providing $10,000 in funds for Service to acquire and install replicas of original plaque and cross); Dep't of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1054, 1100 (2003) ("Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.").

For these reasons, it is clear that the memorial at issue must comply with the Establishment Clause. As one of just a few dozen national memorials, as a monument similar to the ones discussed by this Court in *Summum*, and as a structure whose upkeep is separately provided for by congressional statute, the Mojave cross is, and is understood by *amici* to be, government action.[4]

B. The Message Conveyed By The Memorial Is The Commemoration Of *Christian* War Dead And Veterans.

Since the memorial is subject to Establishment Clause limits, it is unconstitutional if it conveys a message of religious endorsement in the eyes of an objective observer. *See Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring in the judgment); *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). Here, the message conveyed by the memorial, which consists solely of a single large, sectarian cross, is indeed impermissible.

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[4] Under analogous circumstances, lower courts have held that the First Amendment applies. *See, e.g., Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000) (statue's location in former public park created perception of city endorsement of religion that implicated Establishment Clause); *see also Murphy v. Bilbray*, 1997 WL 754604, at *11 (S.D. Cal. Sept. 18, 1997) (invalidating San Diego's sale to a private organization of 222 square feet of land containing a cross atop Mt. Soledad, in part because visitors would not be able to differentiate that "small plot of land" from the surrounding "170 acres of municipally owned and maintained park land," despite the existence of "a small disclaimer plaque").

That message is *not*, as the memorial's defenders claim, one of commemoration for all war dead and veterans, or for all veterans of World War I. *See Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007) (plaque that originally accompanied cross stated that it was "Erected in Memory of the Dead of All Wars"); *id.* at 1074 (Congress sought to "honor[ ] the American veterans" of World War I). What is conveyed by the cross, rather, is respect solely for the sacrifices of *Christian* soldiers – who, as discussed above, are not the only American soldiers who fought and lost their lives in World War I, or in any of the other conflicts in this nation's history.

That is so because the cross is "the preeminent symbol of Christianity," "exclusively a Christian symbol, and not a symbol of any other religion." *Id.* at 1072 (internal quotation marks omitted). Thus, standing alone on a dramatic ledge in the middle of the Mojave Desert, the cross at issue in this case tells observers that America's Christian war dead will not be forgotten, that Christianity is America's faith and the military's, and that the battles the military wages are, above all, Christian battles. At best, the cross says nothing at all about the sacrifices of non-Christian soldiers. At worst, it suggests that those sacrifices are not remembered, honored, or valued.

Courts have frequently agreed with this assessment of a war memorial consisting of a cross. In *Jewish War Veterans of United States v. United States*, 695 F. Supp. 3 (D.D.C. 1998), for example, the court struck down a lighted cross on a military base. "The use of a cross as a memorial to fallen or missing servicemen is a use of what to some is a

religious symbol where a nonreligious one likely would have done as well." *Id.* at 14. And in *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), the court invalidated a war memorial that displayed a cross and a Star of David. The court concluded that "their primary effect is to give the impression that only Christians and Jews are being honored by the county," even though "[t]he evidence is clear that these are not the only two religions in Harris County nor the only two religions of the county's war dead." *Id.* at 235; *see also Buono v. Norton*, 371 F.3d 543, 549 n.5 (9th Cir. 2004); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring in the result) ("[T]he City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans."); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1436 (S.D. Cal. 1991), *aff'd*, 990 F.2d 1578 (9th Cir. 1993).

C. Not All War Memorials That Use Religious Symbols Convey Impermissible Messages.

Certain groups supporting Petitioners argue that if the cross in this case conveys an impermissible, non-secular message, then so too must any number of other war memorials across America, and indeed the world. *See* Brief of *Amici Curiae* Veterans of Foreign Wars of the United States et al. ("VFW Amicus Brief") at 5-6, 10-14; Brief of *Amicus Curiae* The American Legion Department of California ("American Legion Amicus Brief") at 13-16. *Amici* do not agree with this claim.

For one thing, Establishment Clause analysis is highly context-specific. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]his question cannot be answered in the abstract, but instead requires courts to examine the history and administration of a particular practice . . . ."); *Lynch*, 465 U.S. at 678 ("In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application."). A ruling that the cross in the Mojave Desert is unconstitutional would therefore have few implications for other war memorials. Such a holding would apply only to similar crosses standing alone and lacking any tie to a particular serviceperson's memory.

More significantly, not all war memorials that include religious symbols convey the same starkly sectarian message as this cross. When the symbols of several religions are displayed together, for instance, or when religious symbols are accompanied by non-religious monuments, it is generally clear to observers that no particular faith is being privileged above all others, and that the contributions of all fallen soldiers and veterans are equally honored. *Amici* therefore have no objection to the Cross of Sacrifice and the Argonne Cross at Arlington National Cemetery. *See* VFW Amicus Brief at 11-13. Those crosses are accompanied by many non-religious monuments, making the overall message conveyed one of commemoration for all war dead and veterans. *See* Arlington National Cemetery – Visitor

Information – Monuments and Memorials, http://www.arlingtoncemetery.org/visitor_information/monuments.html (last visited July 30, 2009) (listing dozens of secular memorials); *cf. Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument surrounded by secular monuments constitutional); *Lynch*, 465 U.S. at 671 (nativity scene surrounded by secular Christmas decorations constitutional).

Similarly, *amici* do not object in any way to the use of crosses to mark the graves of individual servicepersons. *See* American Legion Amicus Brief at 14. Such crosses communicate the *individuals'* faith and desire to be remembered in a particular religious fashion. They do not express a message of *governmental* endorsement of religion. *See Summum*, 129 S. Ct. at 1132-33 (Souter, J., concurring in the judgment) ("[T]here are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind."). It is notable, in this regard, that the military currently allows its members to choose among more than three dozen "authorized emblems" for their headstones, including the Buddhist wheel of righteousness, the Jewish Star of David, the Bahai nine-pointed star, the Muslim star and crescent, and the Wiccan pentacle. *See* General Information Sheet 40-1330, *supra*; News Release, *supra*, *available at http://www.arlingtoncemetery.net/krkhan.htm* (including photo of gravestone at Arlington National Cemetery with emblem of a Muslim star and crescent). No one could reasonably contend that the government

endorses these faiths whenever their emblems are selected by individual servicemembers.

Accordingly, this Court should not be swayed by the slippery slope arguments presented by the groups supporting Petitioners. A holding that a government-sponsored Latin cross is unconstitutional when it is unaccompanied by any other monuments, religious or otherwise, and is unconnected to any particular servicemember's memory, would in no way challenge the validity of the many war memorials that incorporate religious symbolism in permissible ways, or make suspect the use in military cemeteries of headstones that contain religious symbols requested by individuals.

III. The Message Conveyed By The Memorial At Issue Fosters Divisiveness And Injures The Military As An Institution.

This Court has stressed that one purpose of the Establishment Clause is to avoid fostering social strife and division. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment) (Establishment Clause "seek[s] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike"); *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (Establishment Clause aims to prevent the "anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another"). The message conveyed by the cross in the Mojave Desert fosters just such divisiveness, and in a particularly pernicious way – it harms the military as an institution, undermining the cohesion that is

crucial to military success and damaging recruitment efforts. *See generally Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." (internal quotation marks omitted)).

A. The Message Conveyed By The Memorial Undermines Military Cohesion, Which Is Crucial To Military Functioning.

Nothing is more important to military functioning than internal cohesion. When soldiers trust one another and feel a common sense of patriotism and purpose, the military is able to function effectively and achieve its many challenging aims. As one recent Army War College study put it, "cohesion, or the strong emotional bonds between soldiers, continues to be a critical factor in combat motivation." Leonard Wong et al., *Why They Fight: Combat Motivation in the Iraq War* 23 (2003). "[C]ohesion places a shared responsibility for the success of the unit on each individual while giving each soldier the confidence that someone else is watching over them." *Id.*; *see also* Thomas W. Britt et al., 1 *Military Life: The Psychology of Serving in Peace and Combat* 18 (2006).

But military cohesion can easily be imperiled by discrimination, prejudice, and subtler exclusionary practices. The military's long struggle with racial integration is instructive in this regard. The military integrated following World War II, but powerful racial divisions endured for decades, particularly between the more diverse enlisted personnel and the nearly all-white officer corps.

These divisions persistently undermined military effectiveness as minority recruits felt alienated from their officers and the officers lacked sufficient information about the recruits' concerns. During the Vietnam War in particular, "[f]ights between black and white soldiers were endemic . . . an era now remembered as the 'time of troubles.'" Charles C. Moskos & John S. Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* 33 (1996). "In Vietnam, racial tensions reached a point where there was an inability to fight." David Maraniss, *United States Military Struggles to Make Equality Work*, Wash. Post, Mar. 6, 1990, at A01. The military's "racial problem was so critical that it was on the verge of self-destruction." Elmer J. Mason, *Diversity: 2015 and the Afro-American Army Officer* 3 (1998).

Religious preference and exclusion are not the fundamental problems that racial animus was in the Vietnam era, but they harm military cohesion in similar ways. Thus, according to the Department of Defense, "discrimination against persons or groups based on . . . religion . . . is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment." Dep't of Def., Directive 1350.2 § 4.2 (Aug. 18, 1995). A Coast Guard Academy scholar has likewise noted that:

> promoting a particular religious perspective, or promoting religion in general, is likely to be counterproductive and detrimental to unit cohesion, since it is likely to be offensive to those who do not share the religious perspective being promoted, or

> at least to atheists and agnostics. Such an effort would thus be counterproductive in that it would decrease unit cohesion and morale . . . .

Erik Wingrove-Haugland, *A Pluralistic Approach to Religion in the Military: Accommodating Diversity, Utilizing Consensus, Motivating Sacrifice, and Encouraging Growth* (paper for 2007 International Symposium for Military Ethics), *available at* http://www.usafa.edu/isme/ISME07/Wingrove-Haugland07.html (last visited July 30, 2009); *see also, e.g., United States Air Force – Core Values*, *supra* (quoting the Secretary of the Air Force as stating that "[c]ore values," including respect for all religions, "make the military what it is," since they "instill confidence, earn lasting respect, and create willing followers," are "the values that anchor resolve in the most difficult situations," and "are the values that buttress mental and physical courage when we enter combat").

Here, as discussed above, the memorial in the Mojave Desert conveys a message of religious exclusion, one that might lead "'observers to believe that the [government] ha[d] chosen to honor only Christian veterans,'" even though many non-Christian servicemembers fought and lost their lives in World War I and other conflicts. *Buono*, 371 F.3d at 549 n.5 (quoting *Eugene*, 93 F.3d at 626 (O'Scannlain, J., concurring)); *see also, e.g., McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting) (symbol may be "so closely associated with a single religious belief that [its] display can reasonably be understood as preferring one religious sect over

another"). This message is conveyed to members of the religiously diverse military as well as members of the general public – and it is the former group that can be expected to be particularly attentive to and affected by the message associated with a national war memorial, which honors the very type of sacrifice that they themselves can envision making.

Exclusionary messages like this one drive a symbolic wedge between Christian and non-Christian soldiers, making the numerous members of minority religious groups feel marginalized – less valued and less a part of the group. Such exclusionary messages can cause real harm and have real effects on military functioning. This is illustrated by a number of incidents in which servicemembers have expressed discomfort with actions by their leadership that appear to endorse Christianity over other religions – actions that have had predictably negative consequences for morale, and that, in many cases, the government has taken steps to correct. *See, e.g.*, Dep't of the Air Force, *Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy*, at i-iii, 7-8, 23 (2005), *available at* http://www.foxnews.com/projects/pdf/HQ_Review_Group_Report.pdf (addressing conditions at the Air Force Academy that left "the impression among some cadets that USAFA was insensitive to their religious beliefs and needs"); Josh White, *Officers' Roles in Christian Video Are Called Ethics Breach*, Wash. Post, Aug. 4, 2007, at A08; Alan Cooperman, *Inquiry Sought over Evangelical Video*, Wash. Post, Dec. 11, 2006, at A03 (citing comments by an Army general that President Bush was "appointed by God" and

that Muslims worship "an idol"); Muslims for a Safe America – Should American Muslims Join the American Armed Forces?, Nov. 9, 2008, http://muslimsforasafeamerica.org/?p=5 ("Muslims for a Safe America").

The cross at issue in this case is not as directly harmful as these more overt instances of religious preference and discrimination. But it nevertheless strikes at the heart of what makes the military function, promoting social divisiveness and undermining unit cohesion and *esprit de corps*. As General Douglas MacArthur observed, "[t]he unfailing formula for production of morale is patriotism, self-respect, discipline, and self-confidence within a military unit, joined with fair treatment and merited appreciation from without. . . . It will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government . . . ." *United States Air Force – Core Values*, *supra* (internal quotation marks omitted). The national memorial in the Mojave consisting solely of a Christian cross speaks of just such indifference to members of religious minorities.

B. The Message Conveyed By The Memorial Undermines Military Recruiting.

The Department of Defense has articulated its recruitment goals as follows: "The defense of the nation requires a well-trained volunteer force, military and civilian, regular and reserve. To provide such a force, we must increase the attractiveness of a career in the Department of Defense so that service members and civilian

employees will feel the highest pride in themselves, their work, their organization, and their profession. The attainment of these goals requires that we strive: . . . [to] create an environment that values diversity and fosters mutual respect and cooperation among all persons . . . ." Dep't of Def., *Human Goals Charter* (July 29, 1998), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=43191. These important goals are undercut whenever the government's actions convey a message of religious endorsement with respect to the military. Non-Christians are less likely to want to join the military when they believe they will be marginalized, and perhaps openly discriminated against, if they do enlist.

That Muslims in particular are frequently deterred from joining the military has been widely reported. Ibrahim Cooper of the Council of American-Islamic Relations recently stated that "[t]here is a general reluctance to join because Muslims think there is bias against them and career prospects are limited." *Bias Keeps U.S. Muslims from Army*, IslamOnline.net, Feb. 7, 2007, http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1170620787296& pagename=Zone-English-News%2FNWELayout. Hossan Ahmed, a retired Air Force colonel, similarly described anti-Muslim prejudice in the military as a "big problem," particularly since September 11, 2001. *Id.* And the number of Muslims in the military actually dropped more than ten percent from 2000 to 2005. Riley, *supra*, at 17; *see also* Muslims for a Safe America, *supra* (listing array of Muslims' concerns about joining military).

These problems with Muslim recruitment are worrisome. The military has struggled in recent years to attract sufficient numbers of new soldiers. In 2005, for instance, the active-duty Army missed its recruitment target by the biggest margin since 1979. Damien Cave, *For a General, a Tough Mission: Building the Army*, N.Y. Times, Feb. 5, 2006. More importantly, the military has a particular need for Muslim recruits thanks to its ongoing operations in the Middle East, South Asia, and other predominantly Muslim parts of the world. Servicemembers who are familiar with Islamic customs and religious practices help the military demonstrate openness toward non-Christians, while often calling attention to actions that locals might consider inappropriate or disrespectful. *See* Richard Whittle, *Uncle Sam Wants U.S. Muslims to Serve*, Christian Science Monitor, Dec. 27, 2006. Unfortunately, the military's difficulty in recruiting significant numbers of Muslims makes it less effective in these foreign operations than it otherwise might be.[5]

---

[5] Moreover, just as government-endorsed symbols such as the Mojave Cross undermine the efforts of the military to recruit non-Christians, they also undermine to at least some extent efforts by the United States to appeal to Muslims abroad, and thus undermine U.S. foreign policy and national security interests more broadly. Recent scholarship has demonstrated that American engagement with the Muslim world is crucial to combating the narrow and marginal strands of Islam that produce terrorists intent on harming American interests. *See* Juan Cole, *Engaging the Muslim World* 237 (2009); Emile Nakhleh, *A Necessary Engagement: Reinventing America's Relations With the Muslim World* 82 (2009).

To be fair, the military has made efforts to become more amenable to Muslim recruits, including opening Muslim prayer centers in Quantico, Virginia and West Point and commissioning more Muslim chaplains. *See* Caryle Murphy, *Military, Muslim Life Meld on U.S. Bases; With the Support of the Top Brass, Islam Becoming More Visible in Armed Forces*, Wash. Post, Dec. 21, 1998, at B1; Bernd Debusmann, *Fear of Bias Keeps U.S. Muslims Out of Military*, Reuters.com, Feb. 15, 2007, http://www.reuters.com/article/ newsOne/idUSSIB5 5240620070215. But efforts like these are unlikely to be sufficient so long as potential Muslim recruits – along with recruits of other non-Christian persuasions – receive a mixed message about whether they will be fully accepted as members of the United States military, rather than an unqualified message of neutrality and equal respect toward all religions.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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August 3, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 4 - 2009
OFFICE OF THE CLERK

130 (6)

No. 08-472

In The
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION

It would be ironic indeed if the Constitution were used to stifle expression honoring the memory of soldiers who died to preserve the liberties it was written to guarantee. Neither history nor case law mandates the Ninth Circuit's rigid application of the Establishment Clause, which chills expression instead of protecting it.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

This Court's recent decision in *Pleasant Grove City* is a key to unraveling the case currently before the Court. That case was litigated "in the shadow" of the Establishment Clause. *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1139 (2009) (Scalia, J., concurring). The shadow has now receded and the Establishment Clause challenge is in full view.

I. BUONO DOES NOT ASSERT A DISTINCT INJURY TO HIMSELF THAT WILL BE REDRESSED BY A DECISION IN HIS FAVOR.

Buono is exactly the sort of "concerned bystander" who lacks standing because he is using the judicial process solely to vindicate his own value interests. *United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

> [A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.
>
> *Id.* at 483

Standing cannot be achieved by asserting a constitutional violation without identifying a personal injury suffered *by the plaintiff* as a consequence of the alleged error. Mere "observation of conduct with which one disagrees" is not enough to confer standing under Art. III. *Id.* at 485.

Buono's alleges injury in that he is unable to freely use the public land where the Sunrise Rock cross sits and has altered his behavior to avoid it. *Buono v. Kempthorne,* 371 F.3d 543, 547 (9th Cir. 2004). The inability to unreservedly use public land can constitute a sufficient injury for Establishment Clause purposes. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996). He might also, though somewhat tangentially, satisfy the proximity requirement that courts have identified as a critical factual distinction. *Suhre v. Haywood County,* 131 F.3d 1083, 1087 (4th Cir. 1997). But Buono's whole case is built on the edifice of an alleged injury to a third party and his disagreement with the government's response to that person. The reason for his inability to use the land, and the reason for his avoidance of the cross, is that he would have to "observe conduct with which he disagrees"--specifically, the government's failure to permit others to erect displays and monuments on the property. The only personal injury he can articulate is his general disagreement with the government decision not to open this land as a public forum for the erection of monuments, and his particular disagreement with their denial of a specific request to erect a Buddhist shrine near the cross.

A brief chronology of Buono's contacts with the memorial exposes the flaws in his claim to standing. Buono was employed by the National Park Service ("NPS") as Assistant Superintendent of the Preserve from 1972 to 1997. There is no record that he ever complained about the cross during his 25-year tenure. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002). His objections did not emerge until several years later, after NPS denied the request of Herman R.

Hoops to erect a Buddhist shrine near the cross. Hoops is a former NPS employee and long-term acquaintance of Buono. *Id.* at 1205-1206. As a practicing Roman Catholic, Buono does not find the cross offensive but objects to its presence on federal land solely because the property is not open as a public forum for the erection of other displays such as the one Hoops proposed. *Id.* at 1208. This sequence of events reveals that Buono is not merely asserting the generalized rights of unnamed third parties--which in itself should foreclose standing--but the particular rights of a particular third party who is not before this Court.

As this Court has observed, "cases and controversies" are not simply "convenient vehicles" for correcting perceived constitutional errors or "nuirsances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., supra*, 454 U.S. at 488.

A. Buono Cannot Establish Standing By Asserting The Free Speech Rights Of A Particular Third Party (Herman R. Hoops) Who Is Not Before The Court.

It is a well established prudential principle that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., supra*, 454 U.S. at 474, citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Courts must therefore conduct a "careful judicial examination

of a complaint's allegations to ascertain whether the *particular* plaintiff is entitled to an adjudication of the *particular* claims asserted." *Allen v. Wright,* 468 U.S. 737, 752 (1984) (emphasis added). The power of the judiciary under Art. III exists to redress injury to one or more parties who have a "personal stake in the outcome of the controversy," even though others may also benefit from the judgment. *Warth v. Seldin, supra,* 422 U.S. at 498-499.

This case is a classic third party claim. Buono seeks to adjudicate the rights of a particular third party who is not before the court--his NPS co-worker and long-time acquaintance, Herbert R. Hoops. In 1999, Hoops (also known as "Sherpa San Harold Horpa") requested permission from NPS to erect a dome-shaped Buddhist shrine in an area near the Sunrise Cross. After his request was denied, the American Civil Liberties Union ("ACLU") wrote to NPS, in 1999 and again in 2000, to threaten legal action if they did not remove the cross. *Buono v. Norton, supra*, 212 F. Supp. 2d at 1206.

Prudential limitations on standing exist to avoid "the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 80 (1978); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15, n. 7 (2004). The NPS refusal to grant Mr. Hoops' request to erect a Buddhist shrine is what triggered the controversy currently before this Court. Hoops--not Buono--is the "most effective advocate" for the rights at issue. But he is not a party to this case.

Moreover, there is no special relationship between Buono and Hoops that might justify standing. This Court recently denied standing to a non-custodial father seeking to vindicate the rights of his daughter in connection with her school district's recitation of the Pledge of Allegiance. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. 1. Three of the Justices disagreed, arguing that standing should be predicated on the plaintiff father's right to expose his daughter to his religious views. *Id.* at 24 (Rehnquist, J., concurring). That position acknowledges that in some instances a special relationship might give rise to standing. But Hoops--the most effective advocate for the rights at issue here--is merely a long-time acquaintance of Buono. Buono, who never complained about the cross during his lengthy career with NPS, is precisely the sort of "concerned bystander" who has slipped through the court door attempting to champion the rights of another.

B. If The Third Party (Herman R. Hoops) Were Before This Court Asserting His Right To Erect A Buddhist Shrine, His Claim Would Fail Under This Court's Recent Decision In *Pleasant Grove City v. Summum*.

Buono would no doubt disagree with this Court's decision in *Pleasant Grove City, supra*, 129 S.Ct. 1125. He comes to court through the back door, raising third party free speech rights foreclosed by that decision. His objection to "preferential access to government land" (Opp. 26) presupposes that the land in question is a public forum for the erection of monuments and displays.

Plaintiff Buono is a practicing Roman Catholic who does not personally object to the cross but raises "only the ideological objection that public lands on which crosses are displayed should also be **public fora** on which *other* persons may display *other* symbols." Pet. 9 (italics in original, bold emphasis added); *see also Buono v. Norton, supra*, 212 F. Supp. 2d at 1207-1208. He indirectly raises the very claims that Respondent Summum pursued--and this Court rejected--in *Pleasant Grove City*. One of the main flaws in the Tenth Circuit's reasoning [*Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007)]--and now Buono's--is the rigid presumption that public land is *always* a public forum for any and every type of expression--even permanent monuments--and that there can never be a legitimate secular purpose for government to integrate a religious symbol into its own non-religious message. *Van Orden v. Perry*, 545 U.S. 677 (2005); *Pleasant Grove City v. Summum, supra*, 129 S.Ct. 1125. The analysis only begins--but does not end--with the observation that the cross on Sunrise Rock is a privately erected display resting on public land.

This Court recently recognized that "[p]ermanent monuments displayed on public property typically represent government speech." *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1132. Government must say something in order to govern, and the First Amendment does not permit a "hector's veto" to suppress the government's voice in the "marketplace of ideas." *Id.* at 1131. Moreover, government may receive assistance from private sources without sacrificing the right to speak or inadvertently creating a public forum. *Id.* at 1131.

Pleasant Grove City was decided after the 9th Circuit decision under review. Although the Establishment Clause was not expressly at issue, it lurked beneath the surface and sparked comments from several concurring Justices. Further development of those observations leads naturally to the conclusion that the Sunrise Rock land was never a public forum for the erection of displays or monuments, and the government had a legitimate secular purpose for its efforts to maintain the cross as a memorial honoring deceased veterans.

II. THE ESTABLISHMENT CLAUSE SHOULD NOT BE USED TO SILENCE FREE EXPRESSION OR PURGE THE PUBLIC SQUARE OF ALL RELIGIOUS SYMBOLISM.

In litigating the recent *Pleasant Grove City* case in this Court, the city hesitated to align itself too closely with the Ten Commandments monument at issue because that could raise Establishment Clause concerns. Justices Scalia and Souter both observed the tension between the emerging government speech doctrine and the so-called "wall of separation" between church and state. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1139 (Scalia, J., concurring); *id.* at 1141-1142 (Souter, J., concurring).

There is an "inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other" and the inevitable reality that absolute separation of these two spheres is not possible. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984). The common "wall of separation" metaphor has limited usefulness. Although the Constitution forbids an established church, no

institution can exist in a vacuum. *Id.* at 673. Therefore, this Court has refused to adopt a simplistic, absolutist approach to the Establishment Clause that would undermine its objectives by invalidating every government act that might incidentally confer some benefit on religion. *Id.* at 678.

There are war memorials all across America that utilize the cross as a symbol of the sacrifice of fallen soldiers, particularly those who served in World War I. Examples include the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery; the French Cross Monument in the Cypress Hill National Cemetery; the Peace Cross in Bladensburg, Maryland; the Unknown Soldiers Monument in Prescott National Cemetery; and the Wall of Honor at the Pennsylvania Military Museum. *Buono v. Kempthorne*, 527 F.3d 758, 765, n. 6 (9th Cir. 2008) (O'Scannlion, J., dissenting). The National Park Service manages sites that contain "thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial." *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1133.

The Establishment Clause does not require that the public square be purged of all religious symbolism. The Religion Clauses work together to protect religious freedom from government interference. "It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 44-45. This Court recognized an analogous

potential irony when it upheld the inclusion of a creche in a city's holiday display:

> It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the *Establishment Clause*.
>
> *Lynch v. Donnelly, supra,* 465 U.S. at 686

Similarly, it would be ironic if the Establishment Clause were used to erase a well-recognized image of military sacrifice merely because of its outward resemblance to a single religious symbol.

A. Government Display Of A Monument With Religious Overtones Is Not Necessarily Government Speech Endorsing Religion.

Not every religious display on public land gives rise to an Establishment Clause challenge. The Oregon Supreme Court considered a cross veterans' war memorial in a public park and drew the eminently reasonable conclusion that there was no Establishment Clause violation in light of the secular purpose, the absence of government entanglement with religion, and the lack of evidence that the display advanced or inhibited religion. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976).

Government entities use public land for a variety of civic interests and sometimes reserve space for

projects unrelated to free speech. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1141 (Breyer, J., concurring). The National Park Service should be free to utilize some space to honor the service of deceased military veterans without either opening a public forum or violating the Establishment Clause merely because the symbol used has religious overtones in other contexts. Moreover, the cross does not restrict the right of any visitor to the area to engage in speech or other transitory expression typically associated with a public forum.

In some contexts, the government may "speak" using a display with religious text or meaning, yet without violating the Establishment Clause. Goverment museums, art exhibits, libraries, and holiday displays may include religious items without endorsing particular religious beliefs. The benefit to any one faith or religion is too "indirect, remote, or incidental" to be considered impermissible endorsement or advancement. *Lynch v. Donnelly, supra,* 465 U.S. at 683.

As Justice Souter observed in *Pleasant Grove City*, there is much to be worked out concerning the interaction between the Establishment Clause and the government speech doctrine. But as those issues remain open for further discussion, it would be wise to recognize that:

> [T]here are circumstances in which government maintenance of monuments does not look like government speech at all. *Sectarian identifications on markers in Arlington Cemetery come to mind.*

> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1142 (Souter, J., concurring) (emphasis added)

Honoring the nation's war heroes through the use of sectarian symbols is a well-established practice that in no way violates the Establishment Clause under any of the relevant tests. This legitimate secular purpose would not lead any observer--reasonable or otherwise--to believe that the government intended to adopt or endorse the tenets of a particular religion. Commemoration of fallen soldiers is hardly the sort of activity "motivated wholly by religious considerations" that this Court should invalidate. *Lynch v. Donnelly, supra,* 465 U.S. at 680.

B. A Reasonable Observer Would Understand That The Cross Is There To Honor Fallen Soldiers--Not To Endorse Religion.

The cross has traditionally been used as a symbol to honor and memorialize the sacrifice of America's veterans. All branches of the Nation's service utilize it for that purpose. The Navy Cross, the Distinguished Service Cross (Army), the Air Force Cross, and the Distinguished Flying Cross are examples of the pervasive use of the cross in military culture. (VFW Amicus 9.) This Court should protect the honor it rightly accords to America's veterans, rather than affirming the Ninth Circuit's strained application of the Establishment Clause:

> It is disheartening and distressing to think that Arlington Cemetery must be gutted because

> there are those who are offended by the religious imagery.
>
> VFW Amicus 17

No reasonable observer of the Sunrise Rock cross memorial--presumably familiar with its history and context--would misconstrue its presence or the Congressional efforts to preserve it as an improper endorsement of religion. The Ninth Circuit ignores history, context, and the fundamental manner in which monuments convey meaning.

1. Even If The *Lemon* Test Applied, A Reasonable Observer Would Understand That Honoring The Nation's War Heroes Is A Secular Purpose That Only Incidentally Benefits Religion.

Early in this litigation, the 3-prong *Lemon* test was presumed to be the standard governing the constitutionality of the Sunrise Rock cross. *Buono v. Norton, supra*, 212 F. Supp. 2d at 1214; *see Lemon v. Kurtzman,* 403 U.S. 602 (1971). But in the intervening *Van Orden* decision, this Court determined the *Lemon* test is not useful to analyze a passive monument. *Van Orden v. Perry, supra*, 545 U.S. at 686; *see Buono v. Kempthorne, supra*, 527 F.3d at 764 (O'Scannlion, J, dissenting). Passive acknowledgements of the Nation's religious heritage are "common throughout America," including "the Washington, Jefferson, and Lincoln Memorials." *Van Orden v. Perry, supra*, 545 U.S. at 688, 689, n. 9. War memorials are among those commonly accepted acknowledgements.

Some references to religion in public life are not only acceptable but inevitable in view of the Nation's religious roots. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35 (O'Connor, J., concurring). One legitimate secular purpose for such a reference is "encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly, supra,* 465 U.S. at 693 (O'Connor, J., concurring). Surely the sacrifice of American military veterans is worthy of recognition and appreciation through a universally recognized symbol--the cross--that, in light of its "history and ubiquity," would not be " understood as conveying government approval of particular religious beliefs." *Id*. at 693.

This is not the first time the Ninth Circuit has ignored the clear secular purpose of a cross-shaped war memorial merely because some observer might wrongly perceive it as endorsement of religion. *See Separation of Church and State Comm. v. City of Eugene, supra*, 93 F.3d 617. But this Court has repeatedly rejected the proposition that a "heckler's veto" trumps all other observers. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35 (O'Connor, J., concurring).

> [T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe.... [W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable

> person *might* think [the State] endorses religion.
>
> *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779, 780 (1995) (O'Connor, J., concurring)

The Sunrise Rock cross does not benefit religion generally or Christianity in particular except in a remote, indirect, or incidental manner. This passive use of a religious symbol does not improperly advance religion. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 662 (1989); *Lynch v. Donnelly, supra,* 465 U.S. at 678. It does not compel anyone to do or believe anything--or even to look at it. *Van Orden v. Perry, supra*, 545 U.S. at 694 (Thomas, J., concurring). The cross should not be removed merely because one unduly sensitive observer misperceives its purpose and effect. On the contrary, if the cross were forcibly removed, a reasonable observer might rightly perceive hostility to religion.

2. The Reasonable Observer Would Understand The Memorial Purpose Of The Cross In Light Of Its History And Context.

The Ninth Circuit has turned a blind eye to the history and context of the Sunrise Rock memorial cross. But the reasonable observer is deemed "fully cognizant of the history, ubiquity, and context" of the cross. *Elk Grove Unified Sch. Dist. v. Newdow, supra,* 542 U.S. at 40 (O'Connor, J., concurring); *see County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, supra,* 492 U.S. at 629 (O'Connor,

J., concurring). Moreover, the knowledge attributed to such an observer is not limited to information obtained from merely viewing the cross. *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. at 780 (O'Connor, J., concurring).

Time, location, and the prevalance of other similar American war memorials are among the contextual factors that would lead any reasonable observer to conclude that the government has not endorsed religion. "[T]he history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy." *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 38 (O'Connor, J., concurring). The creche at issue in *Lynch* failed to generate political friction or divisiveness in the 40-year history of Pawtucket's Christmas celebration. *Lynch v. Donnelly, supra,* 465 U.S. at 684. The Ten Commandments monuments in *Van Orden* and *Pleasant Grove City* stood without challenge or controversy for 40 years before a single objection was raised. *Van Orden v. Perry, supra*, 545 U.S. at 702 (Breyer, J., concurring); *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1139-40 (Scalia, J., concurring). The Sunrise Rock memorial has stood peacefully for seven decades--more than twice the time in *Lynch*, *Van Orden,* or *Pleasant Grove City*. This confirms that any reasonable observer would understand its "secular commemorative purpose." *Buono v. Kempthorne, supra*, 527 F.3d at 765 (O'Scannlion, J., dissenting).

The isolated setting of the cross also supports its constitutionality. The Ninth Circuit ignored its location, ruling that even after the land had been sold,

the privately owned parcel was merely a "donut hole" carved out in the midst of a vast federally owned preserve. *Buono v. Kempthorne*, 502 F.3d 1069, 1085-1086 (9th Cir. 2007). But unlike many other Establishment Clause cases, the Sunrise Rock cross is nowhere near the seat of government or even any well-traveled public area. As Justice Thomas observed when this litigation was just beginning:

> [A] park ranger has claimed that a cross erected to honor World War I veterans on a rock in the Mojave Desert Preserve violated the *Establishment Clause*, and won. See *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204-1205, 1215-1217 (C.D. Cal. 2002). If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge.
>
> *Van Orden v. Perry, supra*, 545 U.S. at 695 (Thomas, J., concurring)

The reasonable observer must be deemed aware of the multitude of similar war memorials across America. The use of a lone cross to honor the sacrifice of fallen war heroes is widely understood and accepted. VFW Amicus 8; *Eugene Sand & Gravel, Inc. v. City of Eugene, supra*, 558 P.2d 338. Monuments on government land are generally presumed to be government speech, but in certain contexts--like the sectarian markers in Arlington National Cemetery--there is a common understanding that a display with religious symbolism does not represent the government's chosen views. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1142 (Souter, J., concurring). The Ninth Circuit displays callous indifference to religion by disregarding the ubiquity of

this time-honored symbol and the common understanding of its memorial purpose.

Unlike the Ninth Circuit, a reasonable observer would also understand why the government has denied similar access to others, including Buono's Buddhist acquaintance. The government has neither established a public forum nor endorsed a particular religious viewpoint. The reasonable observer would furthermore recognize the government's efforts to maintain the cross in terms of honoring war heroes--not promoting religion.

3. The Cross May Convey More Than One Meaning And Its Message May Change Over Time.

No one denies the place of the cross in the Christian religion. But as this Court recently recognized, a monument may convey more than one message, and the message perceived may not coincide with the one originally intended by the sculptor or donor. The same monument may be interpreted by different observers in a variety of ways. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1135. A memorial monument funded by many small donations may be motivated by a multitude of differing sentiments--the Vietnam Veterans Memorial Fund, for example, constructed a memorial using funds from over 650,000 donors. *Id.* at 1136, n. 6, referencing J. Scruggs & J. Swerdlow, To Heal a Nation: The Vietnam Veterans Memorial 23-28, 159 (1985). A museum collection might include a painting of a religious scene, but it does not automatically follow that the museum intends to convey the sentiments of the artist or donor. *Pleasant Grove City v. Summum,*

supra, 129 S.Ct. at 1136, n. 5; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1225, n. 3 (10th Cir. 2004).

The mixed-message phenomenon is even more pronounced where the monument contains no text:

> [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and *the effect of monuments that do not contain text is likely to be even more variable*.
>
> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1135 (emphasis added)

An earlier decision of this Court--also involving a cross--illustrates the point. A review board for the State of Ohio unsuccessfully argued that it could exclude a Ku Klux Klan cross from a holiday display on Establishment Clause grounds. *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. 753. This case applied public forum principles and appears to have been decided under the assumption that the cross was a religious symbol. However, Justice Thomas' concurrence highlights the chasm between the Christian use of the cross and the KKK:

> In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning.... *The Klan simply has appropriated*

> *one of the most sacred of religious symbols as a symbol of hate.*
>
> *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. at 770-771 (Thomas, J., concurring) (emphasis added)

The KKK hijacked one of Christianity's primary symbols for its own hateful purposes. Military culture has appropriated the cross for honorable use as a universal symbol of sacrifice. When properly viewed in context, the military cross is no more an endorsement of religion than the KKK cross.

The meaning conveyed by a particular symbol or monument may change over time. This Court has recently observed that trend with reference to war memorials in particular:

> The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." J. Mayo, War Memorials as Political Landscape: The American Experience and Beyond 8-9 (1988).
>
> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1136

The Court went on to describe the metamorphosis of the Statute of Liberty as "a striking example of how the interpretation of a monument can evolve." *Id.* at 1136-37.

The Sunrise Rock cross was originally set in place in 1934 by the Veterans of Foreign Wars (VFW), a private, secular organization. Similarly, private organizations donated the Ten Commandments monuments challenged in *Van Orden* and *Pleasant Grove City*. Selective receptivity is normal government practice with respect to donated monuments, and the donee governmental entity does not necessarily endorse the donor's intended message. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1133, 1136. But in this case, even if the government did subscribe to VFW's message, there is no Establishment Clause concern. The "message" is not religious at all, but rather a visible public memorial to honor the sacrifice of fallen soldiers.

C. The Ninth Circuit Decision Creates The Hostility To Religion That The Establishment Clause Should Prevent.

This Court has observed that "the *Establishment Clause* does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry, supra*, 545 U.S. at 699 (Breyer, J., concurring). The time has come to reign in the runaway Establishment Clause jurisprudence that stifles religious expression and creates the very hostility the Clause was intended to prevent. Removing the Sunrise Rock memorial, merely because of its outward similarity to a religious symbol, would be a draconian solution dishonoring to America's military veterans and hostile to religion.

There is a long line of unbroken authority in this Court holding that the Constitution does not require a complete and absolute separation of church and state,

but rather "mandates accommodation" and "forbids hostility." *Lynch v. Donnelly, supra,* 465 U.S. at 673. In spite of other distinctions and nuances, landmark Establishment Clauses cases over the past sixty years are consistent on this point:

> Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with the accepted habits of our people.
>
> *McCollum v. Board of Education,* 333 U.S. 203, 256 (1948)
>
> The First Amendment does not say that in every and all respects there shall be a separation of Church and State.... Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly.
>
> *Zorach v. Clauson,* 343 U.S. 306, 312-313 (1952)
>
> [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970)
>
> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.

> Eradicating such references would sever ties to a history that sustains this Nation even today.
>
> *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35-36
>
> "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).
>
> *Van Orden v. Perry, supra*, 545 U.S. at 686

The government must carefully avoid intervention in religious matters that would endanger religious freedom, but need not--indeed, must not--display hostility by erasing all references to the nation's religious heritage. Many Establishment Clause challenges could be averted "if the Court would return to the views of the Framers and adopt coercion as the touchstone for our *Establishment Clause* inquiry." *Id.* at 697 (Thomas, J., concurring). The controversy over the Sunrise Rock memorial cross is a good example. In no way does this cross coerce anyone to affirm a religious doctrine or engage in a religious exercise--and its clear purpose has nothing at all to do with religion. Removing it, particularly after a lawful sale at fair market value to a private organization, is exactly the type of hostility the Constitution prohibits.

Moreover, the cross is unlikely to create the sort of religiously based divisiveness the Establishment Clause seeks to prevent. Like the Ten Commandments monument in *Van Orden*, it has stood uncontested for over seven decades. Requiring its

removal would most likely trigger disputes rather than avoid them. *Van Orden v. Perry, supra*, 545 U.S. at 704 (Breyer, J., concurring).

D. Even If There Were A Violation Of The Establishment Clause, Transfer Of Title To The Land Is An Effective Cure.

The Ninth Circuit decision stretches the Establishment Clause beyond recognition. But even if the memorial improperly endorsed religion, the violation ended with the government's sale to Veterans of Foreign Wars (VFW) at fair market value. That sale facilitates free expression protected by the First Amendment and terminates any perceived governmental endorsement of religion.

If the sale had been well below market value to a religious organization, there would be valid concerns. *Mercier v. Fraternal Order of Eagles,* 395 F.3d 693, 702 (7th Cir. 2005). It would also be improper for the government to delegate its civic authority to a religious entity or group chosen according to religious criterion. *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 698 (1994). But VFW is not a religious organization. Even its name is evidence of the secular, non-religious purpose for display of the cross memorial.

The government's sole remaining interest is the possibility that it may reacquire title if the property is no longer used to maintain a war memorial. This is a future interest, unlike the easement in *First Unitarian Church* that constituted a present interest used by the public for free speech and thus subject to forum analysis. *First Unitarian Church of Salt Lake v. Salt*

Lake, 308 F.3d 1114 (10th Cir. 2002). Future interests are not entitled to compensation under the Fifth Amendment. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1257 (2005). The right of reentry is not a constitutionally cognizable property interest. This future governmental interest does not render the Sunrise Rock property a public forum wherein Buono's Buddhist acquaintance might be entitled to erect his shrine next to the cross. *Id.* at 1257; *First Unitarian Church of Salt Lake v. Salt Lake, supra*, 308 F.3d at 1122-23. Affirming the Ninth Circuit ruling would not even redress Buono's concerns about the inability of others to erect displays on the land.

Congressional efforts to maintain the cross do not automatically produce an Establishment Clause violation. *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d at 702. Even if the memorial were truly religious expression--which it is not--government may lawfully accommodate or acknowledge religion. The government respects the best of American traditions when it acts to protect the liberties of its citizens rather than restricting them. That is exactly what happened when the Sunrise Rock property was sold to VFW.

The sale to VFW facilitates free expression honoring war heroes, and it does so in a manner that distances the government from any perceived improper endorsement of religion. Moreover, even if there were residual concerns following the transfer, these should be remedied in a manner that respects the rights of VFW and Americans who wish to join its efforts to honor the memory of deceased veterans. As the Seventh Circuit observed in *Marshfield*, "the only redressable harm that the City must correct is the

perception that it has endorsed the speech." *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000) (emphasis added). Signs, fences, and gated walls could be used to visibly distinguish the small piece of land at Sunrise Rock and identify the expression as that of the new private owner.

1. In The "Public Function" Cases, The Land Transfers Facilitated The Denial Of Constitutional Rights. In This Case, The Land Transfer Facilitates The Exercise Of Constitutional Rights.

The Ninth Circuit declined to adopt a presumption concerning the effectiveness of a land sale to cure an alleged Establishment Clause violation. *Buono v. Kempthorne, supra*, 527 F.3d at 759; *Buono v. Kempthorne, supra*, 502 F.3d at 1082, n. 13. The Court went on to cite from a line of "public function" cases discussed in *Marshfield* to suggest that constitutional violations are not presumptively cured by the mere transfer of land.

But in those "public function" cases, the land transfers facilitated the continuation of a pattern of racial discrimination practiced by the facilities involved. *United States v. Mississippi*, 499 F.2d 425 (5th Cir. 1974) (school); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964) (hospital); *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962) (public golf course). Accommodation and perpetuation of such practices is contrary to both public policy and the Constitution, whereas accommodation of religion and other free expression is mandated by the Constitution.

None of these cases involved a passive display--religious or otherwise. Each involved the ongoing operation of an active program serving the community. In each case, the governmental entity remained "inextricably intertwined with the ongoing operations of the private entity, and the property served the same primary function as before." *Utah Gospel Mission v. Salt Lake City Corp., supra*, 425 F.3d at 1257. The land transfers to private entities were all thinly veiled attempts to evade the requirements of the Fourteenth Amendment and perpetuate a patently unconstitutional practice of discrimination.

The Mississippi case in the Fifth Circuit involved a school. *United States v. Mississippi, supra*, 499 F.2d 425. The government leased an unused school facility to a civic association which in turn leased the property to a private segregated school. This convoluted arrangement was devised to circumvent a desegregation directive to local government. *Id.* at 432.

The case in the Fourth Circuit involved a hospital that continued to perform the state's function of providing medical services to the public. *Eaton v. Grubbs, supra,* 329 F.2d at 713. The city and county donated land and a building to the private corporation that operated the hospital. The government's intimate involvement was further evidenced by capital construction subsidies for expansion. *Id.* at 712. The hospital was given the power of eminent domain that would ordinarily belong to government. *Id.* at 713.

In the other Fifth Circuit case, the Court upheld an injunction against private individuals who purchased two golf courses from the City of Jacksonville and

operated them for "white patrons only." *Hampton v. City of Jacksonville, supra,* 304 F.2d 320.

These cases, like the one at bar, involved reversionary interests and restrictive covenants in favor of the governmental entity transferring land to a private operator. The similarity ends there. As the Seventh Circuit observed, there was continued state action under these "unusual facts and circumstances" where "the government remained intimately involved in exclusively public functions that had been delegated to private organizations." *Freedom from Religion Foundation v. City of Marshfield, supra*, 203 F.3d at 492. The active operations in these cases involved "continuing and excessive involvement between the government and private citizens." *Id.* at 492. The passive display of a war memorial is neither an "exclusively public function" nor an active service to the community like a hospital, school, or golf course. The Ninth Circuit is wrong to equate Congress' efforts to preserve the war memorial on a small piece of land in a remote desert area with the blatantly unconstitutional practices in these "public function" cases.

2. No Reasonable Observer Would Understand The Land Transfer Or The Government's Efforts To Maintain The Cross As An Endorsement Of Religion.

Courts ordinarily assume that a property owner controls the expression on its own property, and therefore will "recognize the effect of formal transfer of legal title to property as a transfer of imputed expression from a public seller onto a private buyer." *Freedom from Religion Foundation v. City of*

Marshfield, supra, 203 F.3d at 491. There are occasional exceptions, particularly where a reasonable observer would not be adequately informed about the change. For example, a public forum may still exist where the property transferred is dedicated to public use, historically associated with a public forum, and physically located so as to create confusion about its ownership. *Id.* at 494. Under such unusual circumstances, a reasonable observer might believe there is improper governmental endorsement of religion. *Id.* at 495. Proximity to the seat of government is another factor that weighs in favor of finding such endorsement. *Id.* at 496. In *Marshfield*, the large cross display was located in a public park that since its creation had expressed only one message--the religious message conveyed by the statue. *Id.* at 495.

There is no such confusion in this case. The cross at Sunrise Rock has stood unchallenged for decades as a memorial to fallen soldiers. It sits in a remote area, nowhere near the seat of government. Although the land might have been deemed a public forum for transitory expression, it has never been a public forum for the erection of permanent structures--nor is there ordinarily a right to erect such structures comparable to the right to speak or distribute fliers. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1129.

The government's purposes and involvement in the sale are also key to the analysis. The lower court concluded that VFW was a "straw purchaser" because of its "significant interest and personal investment in preserving the cross" and the government's unusual efforts to assist in that preservation. *Buono v. Kempthorne, supra*, 502 F.3d at 1085. However,

avoiding litigation is a legitimate purpose for the sale--a purpose not likely to be confused with advancing religion. *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d 693. It is also entirely reasonable, and in no way improper endorsement, to accommodate a buyer like VFW with long-standing ties and an important relationship to the monument. *Id.* at 703. As in *Mercier,* Congress rightfully considered the non-religious purpose for which the cross memorial had stood in place for decades. The government's extensive efforts to maintain the cross are reasonably understood in terms of its history, context, and purpose as a war memorial, rather than as an impermissible attempt to advance religion. *Id.* at 704. A reasonable observer, aware of the memorial purpose and history of the cross, would understand congressional efforts to maintain it through the sale to VFW.

Any lingering concerns about the reasonable observer's perception can be remedied through appropriate visual signals to distinguish VFW's land from public property in the vicinity and clarify any confusion as to the content of the message or its source. In *Mercier*, the new private owner (Eagles) erected a steel fence around the parcel and put up metal signs to educate observers: "PRIVATE PARK" and "THIS PROPERTY IS NOT OWNED OR MAINTAINED BY THE CITY OF LA CROSSE, NOR DOES THE CITY ENDORSE THE RELIGIOUS EXPRESSION THEREON." *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d at 697-698. The district court crafted a similar remedy upon remand in *Marshfield. Id.* at 700. Moreover, the Sunrise Rock cross, like the monument in *Mercier*, is not situated in a prominent location close to a governmental building

where local residents are forced to observe it when conducting civic business. *Id.* at 703. Indeed, if there is any residual potential for misunderstanding about the ownership and message of the cross after its transfer to VFW, it can be readily cured by steps similar to those taken in *Mercier* and *Marshfield*.

CONCLUSION

This case is before the Court under a tenuous construction of standing requirements. It appears contrived to create a vicious circle where no one can win: the government either has violated the free speech rights of a third party who is not here to assert them--or it has breached the "wall" of church-state separation. Even if Buono does have standing, there is no Establishment Clause violation to correct. The cross has historically been used by the military as a symbol of sacrifice, and no reasonably informed observer would perceive it as endorsing religion. Affirming the Ninth Circuit would have onerous repercussions for war memorials across America, silencing the memory of the many veterans who have given their lives on the battlefield to protect liberties guaranteed by the Constitution and foreclosing even the reasonable compromise attempted by Congress in selling the land to a private organization that is not bound by the Establishment Clause.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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(13)

No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEN SALAZAR, Secretary of the Interior, in his official capacity, ET AL.,

Petitioners,

v.

FRANK BUONO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God, including *American Atheists, Inc. v. Duncan*, No. 08-4061 (10th Cir.) (public highway memorial crosses).

The Foundation has an interest in this case because, contrary to Respondent's contentions, it believes that religious symbolism in the public sphere does not violate the Constitution. Moreover, the Foundation is concerned that government officials may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to

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[1] *Amicus curiae* Foundation for Moral Law files this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

those government officials who have demonstrated indifference, ignorance, or disdain toward them. Symbols can have multiple meanings. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, whether the cross erected in 1934 atop Sunrise Rock in the Mojave National Preserve violates the Establishment Clause of the First Amendment, and whether, considering the transfer of property from the National Park Service to the Veterans of Foreign Wars, the lower courts showed the proper deference to the intent of the legislative branch of government that the separation of powers inherent in the United States Constitution requires.

SUMMARY OF ARGUMENT

The placement of a cross atop Sunrise Rock in the Mojave National Forest did not constitute an establishment of religion in violation of the First Amendment.

The National Park Service's sale of the acre of land in the Mojave National Preserve does not constitute an establishment of religion in violation of the First Amendment, any more than the inscription "In God We Trust" on our coins and currency is a First Amendment violation. Rather, the cross is a time-honored universal symbol of respect for veterans who have died in the service of their country.

Even if the placement of the cross was a First Amendment violation, the sale of the acre of land on which the cross was located does not constitute an evasion of the First Amendment or the orders of the lower courts, any more than payment for groceries is an attempt to evade theft laws or driving 55 mph is an attempt to evade speeding laws. Rather, the sale was

a good faith attempt to comply with the First Amendment and with the orders of the lower courts.

The separation of powers inherent in the United States Constitution requires each branch of government to respect the other branches. For this reason, when Congress transferred the property on which this cross stood to the Veterans of Foreign Wars in order to comply with the Establishment Clause, the Ninth Circuit erred by refusing to give at least presumptive deference to that transfer. The Ninth Circuit not only impugned the motives of Congress in transferring the property; it also encumbered the VFW's use of the property by holding that the VFW could not display a cross on its property because the National Parks Authority had unconstitutionally displayed the cross on that property in the past. The VFW's freedom of expression is guaranteed by the First Amendment and should not be infringed because of the alleged past constitutional violations by the NPA.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). As applied to this case, the placement of this cross does not dictate religion, and it does not represent a form of an establishment. Thus, the decision of the court below should be affirmed, but the rationale should rest on an explication of the text of the First Amendment rather than the weak foundation of discordant Establishment Clause precedents.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clause.*

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE MOJAVE DESERT CROSS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT BY JUDICIALLY-FABRICATED TESTS.

The courts' analysis of this case should be governed by the text of the "supreme Law of the Land" instead of by judicial tests created by the courts.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support *the Constitution itself*—not a person, office,

government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). That same year, the United States Supreme Court confirmed that the constitutional words deserve deference and precise definition: "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

On June 26, 2008, this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> In interpreting this text,[2] we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases

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[2] By "this text" the *Heller* Court evidently meant the Second Amendment to the United States Constitution, although the principle articulated here is hardly limited to that Amendment: *e.g.*, the *United States v. Sprague* case quoted dealt with Article V of the Constitution.

were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, No. 07-290, Slip op. at 3 (June 26, 2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

B. The *Lemon* test, the endorsement test, and the *Van Orden/McCreary* compare-and-contrast test, or all of them together, are constitutional counterfeits that contradict and obscure the text of the "supreme Law of the Land."

The "*Lemon* test" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is widely used as an analytical framework for analyzing Establishment Clause cases, but the test "has been criticized heavily by many, and not all members have adopted the test."[3] *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1252 (2007).

The lower courts' difficulty in trying to cobble together an interpretative rule for Establishment Clause cases is caused by reliance upon hopelessly

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[3] The district court in *American Atheists* noted that the *Lemon* test has been refined by the Court, and "under the revised version, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.' *[County of] Allegheny [v. ACLU*, 492 U.S. 573] at 592-93 [1986] (quoting *[Wallace v.] Jaffree*, [472 U.S. 38] at 70 (O'Connor, J. concurring in judgment)." *Amicus* would observe that the *Lemon* test was further revised in *Agostini v. Felton*, 521 U.S. 203 (1997), in which J. O'Connor, writing for the majority, eliminated the third prong ("excessive entanglement") of the *Lemon* test and held that excessive entanglement was simply one of many factors to be considered in determining whether the government action has the principle or primary effect of advancing or inhibiting religion.

inconsistent Supreme Court decisions and tests instead of using the plain language of the Constitution. It is the courts' jurisprudential rejection of the First Amendment's text—indeed, its rejection of *any* one firm standard—and lower court cases based upon that rejection that continues the grand legal march away from the Constitution and into ever-increasing jurisprudential disarray.[4]

Justice Scalia well described the courts' confusion about the Establishment Clause in his concurring opinion in *Lamb's Chapel v. Center Moriches Union*

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[4] Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997). *See also Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (Thomas J., concurring in judgment) (collecting cases).

Free School District, 508 U.S. 384, 398-99 (1993). Eight Justices used the *Lemon* test to uphold a church's right to rent a public school auditorium. Scalia concurred but wrote separately:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, to be sure, was not fully six feet under; our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test' but also declined the opportunity to overrule it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. ...
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to its tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts.' Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. (Citations omitted.)[5]

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[5] In a footnote to the majority opinion, Justice White commented on Justice Scalia's concurrence: "While we are somewhat diverted by Justice Scalia's evening at the cinema, we

The more opinions the Supreme Court and lower courts generate under modern Establishment Clause jurisprudence, the more "murky" the waters become, and the courts' repetitious claim of "no clear standard" becomes a self-fulfilling prophecy.

Unfortunately, the Supreme Court views the lack of a bright line test to be laudatory. In *Lemon* the Court observed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. 403 U.S. at 612. The Court reiterated this idea in *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984), intoning that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."

This jurisprudential attitude confuses complexity with intelligence and sensitivity with difficulty. Just because an area of the law deals with a sensitive subject like religion does not mean that the answer to the conflict must be difficult to achieve, and interweaving various factors and levels of analysis into an area of the law does not automatically make the law more intelligent. Yet this is exactly what the Supreme Court has done with its proliferation of tests: the *Lemon* test, the *Agostini*-modified *Lemon* test, the

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return to the reality that there is a proper way to inter an established decision, and *Lemon*, however frightening it may be to some, has not been overruled." 508 U.S. at 395 n.7.

endorsement test, the coercion test, the neutrality test, and so on. These tests have created more problems than they have solved, producing a continuum of disparate results. As Justice Thomas recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases is so voluminous, incoherent, and incessantly changing that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ."[6] *Van Orden*, 545 U.S. at 694

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[6] Recent district court opinions have aimed scathing critiques at the unsettled nature of the law in this area, noting that the Supreme Court's Establishment Clause jurisprudence is: "hardly Paradise" but "more akin to Limbo" than Purgatory,

(Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Ky.*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent which has no basis in law or reason. *See Marbury*, 5 U.S. at 180; U.S. Const. art. VI. In addition to jurisprudential confusion, the practical result of these judicial tests is to foster *hostility* toward religion.

C. The primary effect, if not the purpose, of *Lemon* and other judicial tests is often hostility to the historically important role religion has played in our country.

"There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674; *see also Van Orden*, 545 U.S. at 686-90 (listing numerous examples of the

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Green v. Haskell County Bd. of Comm'rs, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystifl]ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005), and "utterly standardless" jurisprudence in which "ultimate resolution depends on the shifting subjective sensibilities of any five members of the High Court." *Newdow v. Congress*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005).

"rich American tradition" of the federal government acknowledging God and religion). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853). The Supreme Court has noted that "religion has been closely identified with our history and government." *School Dist. of*

Abington Tp., Pa. v. Schempp, 374 U.S. 203, 213 (1963).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Cities across the land, and particularly in the West, have names and symbols that reflect the faith of the Spanish and American setters.

The Ninth Circuit contends that the cross is "exclusively a Christian symbol." *Buono v. Kempthorne*, 527 F.3d 758, 768 (9th Cir. 2008) (denying reh'g and en banc review). While the cross is certainly a symbol at the heart of the Christian religion, the court below presumed to discern undisclosed motives behind the placement of the cross on Sunrise Rock. The findings of fact of the United States District Court for the District of Utah, in *American Atheists, Inc. v. Duncan, supra*, concerning the placement of memorial crosses beside state highways to honor highway patrolmen who had been killed in the line of duty, are highly relevant and instructive:

> 20. A highly motivating factor in the selection of the memorial cross was [the Utah Highway Patrol Association's] belief that only a cross could effectively convey the simultaneous messages of

death, honor, remembrance, gratitude, sacrifice, and safety.

21. The UPHA also chose the white cross because it is commonly used as a memorial symbol in cemeteries, particularly government owned/sponsored military cemeteries in this country and elsewhere in the world.

22. The UPHA chose the white cross because such crosses are a time-honored medium for memorializing soldiers, and the fallen troopers it represents are entitled to the same high honor because each of them died in the line of duty for their fellow citizens.[7]

528 F. Supp. at 1249.

In United States military cemeteries throughout the world, one finds row upon row of white crosses to honor and remember with gratitude those who served with honor and made the ultimate sacrifice for their country. In military cemeteries within the United States, graves are commonly marked by a white slab, and the overwhelming majority of these are inscribed at the top with a prominent cross. Likewise, crosses are prominent symbols in all kinds of publicly-owned and privately-owned cemeteries throughout this land. And although the Ninth Circuit refers to the Mojave cross as the "Latin cross," there is no evidence whatsoever that the VFW or others involved with the placement and maintenance of the Mojave cross chose the cross or any particular form of the cross because of religious considerations. In *Van Orden*, the plurality opinion recognized that even classic religious symbols

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[7] This case is on appeal to the United States Court of Appeals for the Tenth Circuit.

may have various meanings and purposes depending on their context. *Id.* at 690-91. Likewise, in *American Atheists* at 1253, the court found that "the memorial crosses at issue communicate a secular message, a message that a [Utah Highway Patrol] trooper died or was mortally wounded at a particular location." Likewise in this case, anyone informed as to the various meanings of the cross and the history of this particular cross and the persons and organizations involved with its placement and maintenance would not understand the Mojave cross to be a governmental endorsement or establishment of religion.[8]

Acknowledgments of religion and God should not be removed simply because they have a religious meaning or because they originate from those with religious purposes. Judicial tests that have departed from the text of the First Amendment, when not merely adding to the confusion that reigns in Establishment Clause jurisprudence, will continue the modern trend of expunging from the public square anything that is remotely religious. It is time for the federal courts to return to the plain and original text of the First Amendment, which, when applied to this case, supports the position of the U.S. Department of Justice and the National Park Service that the Mojave cross does not violate the First Amendment.

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[8] However, that same observer, perceiving the cross covered with a plywood box as it is at present, pursuant to the trial court's order, would very likely perceive this crude act of censorship as government hostility toward religion.

II. THE MOJAVE CROSS DOES NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no *law* respecting an *establishment* of *religion*, or prohibiting the free exercise thereof." U.S. Const. amend I (emphasis added). Even if the cross is a symbol that is considered religious, its placement could not be considered a "law respecting an establishment of religion."

A. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[9] In all these instances, "religion" was defined as follows:

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[9] Later in *Torcaso v. Watkins*, the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. 488, 492 n.7 (1961).

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The *Reynolds* Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned

by the Supreme Court,[10] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

330 U.S. at 13. The *Virginia Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance*. *See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5 *Founders' Constitution*, 84-85 (Kurland and Lerner eds., U. Chi. Press: 1987). The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. 330 U.S. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339

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[10] *Macintosh* was overturned by this Court in *Girouard v. United States*, 328 U.S. 61 (1946).

U.S. at 64. Thus, this Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H.R. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as 2005 stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to

> religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

The Mojave cross cannot be considered a law respecting "religion" because, even though the cross is a religious symbol sacred to Christians, the symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is "religious" to some, but it is not a "religion," properly defined, to anyone. Moreover, that which constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out, *i.e.*, "the dut[ies] which we owe to our Creator, **and** the manner of discharging [them]." A symbol of the cross does neither and thus cannot be considered a "religion."

B. The definition of "establishment"

Even assuming, *arguendo*, that the Mojave cross is a "religion" and its placement on Sunrise Rock is a "law," the placement of the Mojave cross by the VFW cannot be considered an "establishment."

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting

among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment." *See, e.g.*, Story, *A Familiar Exposition*, *supra*, § 441 (Establishment Clause cannot be attributed to "an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real

object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the Mojave cross

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church.

> It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*).

The word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. The Mojave cross does not come close to that level of state involvement with religion.

III. THE PUBLIC ARENA MUST NOT DISCRIMINATE AGAINST RELIGIOUS EXPRESSION.

America's commitment to freedom of expression is based in large part upon the belief that truth is most likely to win out in competition in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissent); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). *Keyishian* further recognized that "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 605-06.

Widmar v. Vincent, 454 U.S. 263 (1981), held that a state university may not discriminate against religious expression by making its meeting rooms available to nonreligious organizations but not to religious organizations. A similar principle applies to other forms of government property except closed forums such as jails or military reservations.

In the 208 years since the ratification of the First Amendment, the public arena has expanded exponentially. At that time schools were mostly private or parochial; now public schools and universities are the norm. At that time, except in

cities and towns, roads were relatively few and often privately owned; today public streets, roads and highways interlace the nation. Add to this public parks, theaters, coliseums, museums, office buildings, national forests, public radio and television, and a host of other publicly-owned entities, and we find that the public arena has become the primary arena for the exchange of ideas.

The marketplace of ideas involves competition among many ideas -- some religious, some secular, some a combination of both. Sometimes religious ideas compete with other religious ideas; sometimes they compete with secular ideas. Sometimes they involve alternative explanations, approaches, or solutions to the same underlying problems.

If government gives secular expression full access to the public arena, but restricts or prohibits religious expression in the public arena, then government has placed religious ideas at a distinct disadvantage. This has always been true, but the more the public arena expands, the more severe this disadvantage becomes.

A policy that allows display of purely secular symbols but prohibits display of a cross, constitutes the hostility to religion Justice Clark warned of in *Abington Township v. Schempp*, 374 U.S. 203, 294 (1963), when he said, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."

The Mojave cross is a form of expression. The lower courts' prohibition of the Mojave cross, while other forms of expression are permitted, is blatant subject-matter discrimination and viewpoint discrimination against this form of expression. The Foundation respectfully urges the Court not to

interpret the First Amendment in a way that places certain forms of expression at a disadvantage simply because that expression employs symbols that have a religious origin or meaning for someone.

IV. THE COURT SHOULD BALANCE THE INTERESTS OF THE MAJORITY AND THE INTERESTS OF THE MINORITY.

As James Madison made clear in *Federalist No. 10,* constitutional government is concerned about balancing the interests of the majority and the interests of the minority. Nowhere is that more important and more difficult than in First Amendment jurisprudence.

In matters concerning public exercises such as prayer, the majority must be especially careful to respect and protect the interests of the minority. That respect and protection might take the form of abstaining from such exercises or allowing the minority to leave the room or remain silent.

But in matters concerning the public display of symbols, the balance shifts somewhat toward the interests of the majority and the minority should respect the majority's right to display symbols that reflect its beliefs and values. In *American Atheists* at 1258-59 the court observed that "An informed observer in this case would be more reasonable, neutral, and tolerant than the *Friedman* [*v. Board of County Commissioners,* 781 F.2d 777 (10th Cir. 1985)] observer." True tolerance does not consist of shutting down any public display with which someone disagrees, but rather of learning to respect the rights of those who want to display it.

This is a case involving public display of a memorial which, some believe, has a religious origin and meaning. Those who do not agree with the meaning some attach to the cross, should nevertheless respect the right of the Veterans of Foreign Wars to honor fallen soldiers and the right of those soldiers' loved ones to honor and remember them in the way that is most meaningful to them.[11] The First Amendment should be a shield to protect freedom of expression, not a sword to censor and silence expressions with which one does not agree.

V. ACCOMMODATION OF RELIGION

In *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. ...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

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[11] *See* Richard J. Neuhaus, *The Naked Public Square* 2 ed. (Eerdmans 1984, 1988).

Although *Amicus* has shown that the display of the cross is not unconstitutional under the words of the First Amendment, to the extent that this Court concludes that the Mojave cross display is religious, the Court should consider it a justifiable accommodation of religion. Those who want to honor their veterans by observing this display of a cross have a right to do so. Congress's method of solving a possible conflict with the lower courts' interpretation of the Establishment Clause by transferring the land to the VFW while restricting its use and reserving a reversionary right if the land ever ceases to be used to honor veterans, is a justifiable accommodation and, as Justice Douglas said in *Zorach*, "follows the best of our traditions," because it then "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.*

VI. THE OPINION OF THE NINTH CIRCUIT VIOLATES THE CONSTITUTIONAL CONCEPT OF SEPARATION OF POWERS BY NOT GIVING PROPER DEFERENCE TO THE PURPOSES, MOTIVES, AND ACTIONS OF THE LEGISLATIVE BRANCH.

Although the exact words "separation of powers" do not appear in the Constitution, the concept is readily apparent in the language of Article I vesting legislative power in Congress, Article II vesting executive power in the President, and Article III vesting judicial power in the courts. In *United States v. Brown*, 381 U.S. 437, 443 (1965), this Court described the separation of powers as "a bulwark against tyranny" and stated that "if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive

implementation, no man or group of men will be able to impose its unchecked will." The power of judicial review may be a judicial check upon legislative power, but it should be exercised with due respect and deference to Congress.

That respect includes deference to the stated purposes of Congress in enacting legislation. For example, in *Champion v. Ames*, 188 U.S. 321, 356-57, 362 (1903), this Court upheld the power of Congress to prohibit the interstate sale of lottery tickets. Congress, the Court said, has the authority to regulate interstate commerce; lottery tickets are articles of commerce; therefore, Congress has the authority to regulate their interstate sale. The possibility that Congress's real motive was to suppress lotteries rather than regulate commerce was beyond the power of the Court to inquire. Likewise, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964), this Court held that the Heart of Atlanta Motel was engaged in interstate commerce and therefore Congress could prohibit the Motel from refusing to rent rooms on the basis of race. The possibility that Congress's real purpose was to eliminate racial discrimination rather than regulate interstate commerce was not a proper subject for the Court to consider. And in *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), the Court concluded that it could consider the effects of child labor legislation but could not consider Congress's motive:

> We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important

> function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In the case before us, the Ninth Circuit expressly refused to entertain a presumption that the transfer of property from the Department of the Interior to the VFW ended any Establishment Clause violation. In so doing it disregarded the clear purpose of § 8121 and cited the restrictions and reversionary rights set forth in the statute to ensure that the cross continues to be a veterans' memorial, and twisted those restrictions and reversionary rights into a basis for characterizing the statute as an attempt to evade the lower court order and the Establishment Clause. Congress's purpose was to comply with the court's interpretation of the Establishment Clause. Compliance is not evasion.

A due respect for a coordinate branch of government requires, at the very least, a higher degree of deference than this. When one branch of government unduly elevates itself into the position of judging and second-guessing the motives and purposes of coordinate branches, it loses sight of its proper place in our constitutional system of government.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545

U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. The proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the court's decision below should be reversed.

Respectfully submitted,

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June 8, 2009

AMICUS CURIAE BRIEF

(37)
Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE

No. 08-472

In The
Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF INTERIOR, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

The Freedom From Religion Foundation ("Foundation")[1], a national nonprofit organization based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason, rather than faith, tradition or authority. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church.

The Foundation's interest in this case arises from two distinct concerns. First, religious symbols on public property that violate the Establishment Clause of the First Amendment to the United States Constitution cannot be remedied by simply selling off or transferring portions of public property to private parties in order to ensure the symbol remains. The Foundation has brought more than forty lawsuits in federal and state courts to remedy Establishment Clause violations, more than a quarter of these challenging religious symbols on government

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[1] This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties and copies of their written consent are being lodged herewith.

property. The Foundation and its members are frequently involved as plaintiffs in lawsuits challenging the government's display of religious symbols on public property, including the two land transfer cases cited by both parties in this case, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) and *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), and other cases brought forth by Foundation members, such as *Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412 (7th Cir. 1993), and the series of cases involving the Mt. Soledad cross.

Second, war memorials designated by Congress and state governments to honor veterans should remain free from religious imagery. The myth is false that "there are no atheists in foxholes." The Foundation's own membership includes veterans of World War II, the Korean War, the Vietnam War, the Gulf War and current military servicemen and women involved in U.S. military operations in Iraq and Afghanistan. Many of the Foundation's founding members, when the group went national in 1978, were World War II veterans and some of its early members were World War I veterans. Federal and state governments have consistently failed to recognize the contributions and sacrifices of "atheists in foxholes" and the actions in this case continue to demonstrate government favoritism toward Christianity over all other faiths and religion over non-religion. In an effort to honor its veteran membership the Foundation has erected an Atheists in Foxholes

monument on the grounds of its southern Freethought Hall in Lake Hypatia, Alabama, and gives out its Atheist in Foxhole award. Further information about the "no atheists in foxholes" myth, the Foundation's monument in Alabama and the annual Atheists in Foxholes award is included in the Appendix – Parts A, B, and C.

SUMMARY OF ARGUMENT

The Latin cross atop Sunrise Rock ("Sunrise Rock cross") is a purely sectarian symbol that cannot be viewed as anything other than the preeminent and exclusive symbol of Christianity. Congress should not designate any national memorials consisting solely of patently religious symbols. To do so not only violates the Establishment Clause of the First Amendment to the United States Constitution, which secures the freedom of conscience of all American citizens by ensuring government does not promote religion, but also grossly disrespects the growing non-Christian and non-religious segment of the U.S. population. Any nationally designated war memorials should honor all veterans regardless of religious preference or practice.

The government's placing or condoning of religious symbols on government property is a blatant violation of the separation between state and church that cannot be remedied solely by selling off, transferring or exchanging the disputed parcel or

symbol. The only truly effective way to end the perception of government endorsement of the religious message is to remove the symbol.

Even if this Court deems land sales, transfers or exchanges to be the proper remedy for this type of an Establishment Clause violation, the Ninth Circuit's decision to remove the Latin cross should be affirmed. Notwithstanding the land transfer, the violation continues through the Congressional designation of the cross as a national memorial, the reversionary interest contained in the land transfer agreement and the continuing and ongoing supervision and management by the government of the federal area.

This case comes down to a simple truth: the most effective remedy for an unlawful display on public property is to remove the display.

ARGUMENT

I. THE LATIN CROSS AT SUNRISE ROCK IS A PURELY SECTARIAN SYMBOL THAT, EVEN IF DEEMED A NATIONAL MEMORIAL TO HONOR VETERANS OF WORLD WAR I, CONVEYS A RELIGIOUS MESSAGE.

In assessing the constitutionality of religious symbols on government property, this Court, as well as a majority of federal courts, continue to apply the analysis outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a governmental

practice violates the Establishment Clause if it does not have a secular purpose, if its primary effect is to advance or inhibit religion, or if it fosters excessive government entanglement with religion. *See Stone v. Graham*, 449 U.S. 39, 40-41 (1980). The Establishment Clause is violated if the government action fails any prong of this test. *Id.* Despite reliance on this three-prong test, no bright-line rule exists for evaluating Establishment Clause cases and each challenge must be based on fact-specific analysis. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989).

This Court has also used the "endorsement test" to determine the validity of a challenged government action. In *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring), Justice O'Connor wrote that "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Justice O'Connor's primary concern was whether a particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. This test subsequently was adopted and used in *Allegheny*,

> "Whether the key word is 'endorsement', 'favoritism', or 'promotion,' the essential principle remains the same. The Establishment

> Clause at the very least prohibits the government from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" 492 U.S. at 593-594 (quoting *Lynch*).

A Latin cross on government property is an expressive activity that certainly creates a perception of government endorsement. The Sunrise Rock cross, displayed on a prominent place in the Mojave National Preserve ("Preserve") for over seventy years, unabashedly creates the perception of government endorsement. It conveys the message to the twenty-six percent of the U.S. population[2] who are not Christians that they are not "favored members of the political community." *Id.* The cross, even if described as a war memorial, has an exclusionary effect, making non-Christian and non-believing veterans political outsiders.[3]

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[2] *See* http://www.americanreligionsurvey-aris.org/ (last visited July 29, 2009).

[3] Have not Mojaves and other Native Americans, many of whom are not Christians, served their country with valor in American wars? Are they too to be excluded from a memorial in the midst of a federal reserve, which their ancestors called home?

A. The Overwhelming Majority Of Federal Courts Have Recognized The Latin Cross To Be An Inherently Religious Symbol.

Many recent cases have specifically concerned the Latin cross being displayed on public property. A Latin cross is one described as having two arms, one horizontal, one vertical, at right angles to one another. *See Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007).

The religious significance of the Latin cross is unambiguous and indisputable. "The Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring). An overwhelming majority of federal courts agree that the Latin cross universally represents the Christian religion, and only the Christian religion. *See, e.g., Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) ("There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause.") (fifty-one foot Latin cross located on a butte in city park was not permissible); *Gonzales*, 4 F.3d at 1421 ("[A]n attempt to create an aesthetically pleasing religious symbol does not obviate its religious purpose.") (a crucifix in public park intended to act as war memorial was not permissible); *Harris v. City of Zion*, 927 F.2d 1401,

1412 (7th Cir. 1991) ("a Latin cross . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity.") (a Latin cross was not allowed on city's seal), *cert. denied,* 505 U.S. 1218 (1992); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) ("When prominently displayed . . . the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but sectarian.") (an illuminated thirty-five foot by eighteen foot Latin cross on top of fire station as part of Christmas display was not permissible), *cert. denied*, 479 U.S. 961 (1986); *ACLU of Ga. v. Rabun County Chamber of Commerce,* 698 F.2d 1098, 1103 (11th Cir. 1983) (per curiam) ("Substantial evidence supports the district court's finding that the Latin cross is a universally recognized symbol of Christianity.") (Large, lighted cross in state park was not permissible); *Libin v. Town of Greenwich,* 625 F.Supp. 393, 399 (D. Conn. 1985) (Burns, J.) (cross has meaning only as symbol of Christianity; invitation to viewer to make religious connection "can be construed as a message endorsing the religious beliefs that allow the connection to be made") (display of cross on firehouse held not permissible); *Jewish War Veterans v. U.S.*, 695 F.Supp. 3, 15 (D.D.C. 1988) ("[The Latin cross] The principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message.") (a

large cross on Marine Corps base intended as a symbol of national resolve was not permissible); *Mendelson v. City of St. Cloud*, 719 F.Supp. 1065, 1069 (M.D. Fla. 1989) (The Latin Cross is the "unmistakably universal symbol of Christianity, and has no secular purpose.") (ruling that Latin cross on city tower was not permissible); *Houston ACLU v. Eckels*, 589 F.Supp. 222, 234 (S.D. Tex. 1984) ("That the cross . . . is the primary symbol for Christianity . . . is beyond question.") (three Latin-style crosses and a Star of David as part of a war memorial in a public park were not permissible).

No court of final resort has ever upheld the government's *permanent* display of a Latin cross on public land as constitutional.

The inherent religious significance of the Latin cross is undeniable and is not disguisable. No secular purpose, no matter how sincere, will detract from the overall message that the Latin cross stands for Christianity and the overall display promotes Christianity. The display of this patently religious symbol on a prominent rock within a national preserve confers government endorsement of Christianity, a blatant violation of the Establishment Clause. The Sunrise Rock cross could not stand alone in the federal preserve, nor could it remain where it is without the extraordinary intervention of Congress taken for religious purposes.

B. The Sunrise Rock Cross, As A War Memorial, Conveys A Message Of Government Endorsement Of Christianity.

The Veterans of Foreign Wars (VFW) originally erected a cross in the Mojave Desert Preserve to honor the fallen soldiers. In 2002, after litigation over the cross's removal ensued, Congress passed Pub. L. No. 107-117, § 8137, which designated the cross as a national memorial commemorating U.S. participation in WWI.[4] The Petitioners argue that the cross is not a religious message but rather a symbol of death and remembrance for veterans.

Even if this Court accepts the Petitioner's argument that the Sunrise Rock cross is acting as a war memorial, this designation cannot overcome the government's message of Christian endorsement. As the district court in *Mercier I* noted,

> " . . . it is difficult to see how dedicating a [religious] monument to a particular group can diminish its religious nature. A Bible is no less holy because the blank line following the phrase 'Presented To' in the front cover is filled in with the name of a non-believer instead of a Christian minister. Building a church in memory of a beloved parishioner does not make it any less a place of worship." *Mercier v. City of La Crosse*, 276 F.Supp.2d 961, 974 (W.D. Wis. 2003).

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[4] This legislation also provided for installation of a memorial plaque and a replica of the original VFW cross from 1934.

Likewise, dedicating a Latin cross to fallen soldiers does not alter the inherently religious message that the cross conveys. *Id.* The Seventh Circuit came to the same conclusion in *Gonzales*. In that case, a Roman Catholic crucifix was placed by the Knights of Columbus in a public park, with a plaque dedicating it to those who have sacrificed their lives to defending this country. *Gonzales*, 4 F.3d at 1414. The court was not convinced that the primary reason for the crucifix was the purpose of a war memorial. Rather, the court decided the memorialization was simply a means to an end, of achieving a secular purpose. *Id.* at 1421. The court held "the *Lemon* test does not permit a municipality to exempt a[n] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to honored dead." *Id.*

Also significant is that the plaque on the crucifix was hidden by shrubbery and less than thirty years after its original placement, the plaque had gone missing. The Seventh Circuit recognized there would be "no chance that anyone without special knowledge of the crucifix's history would know that it was purportedly intended to memorialize fallen soldiers." *Id.* at 1423.

Similarly, the cross atop Sunrise Rock lost its original plaque indicating its dedication, and for an unspecified number of years (believed to be throughout most of its history) has had no indication that its purpose is to serve as a war memorial. Additionally, no evidence has been offered to show that the cross

has been used for any services commemorating war veterans. Instead, the record indicates that devotional Easter services have been held at the site for numerous years. *Buono III*, 502 F.3d at 1072. Therefore, it is a sham to refer to the cross as a war memorial.

Even should this Court find that a justified secular purpose exists and that the display can be called a war memorial, the Sunrise Rock cross will nevertheless fail the second and third prong of the *Lemon* test. In order to determine whether the cross advances or inhibits religion in its principal or primary effect, the Court must look to the message conveyed by the religious symbol.

Congress's attempt to camouflage a patently religious message by declaring the cross a war memorial and including a replica of the original sign does not erase the monument's primary message. The primary message conveyed by displaying a Latin cross is an endorsement of Christianity, despite any secular purpose that may be proclaimed. *See, e.g.*, *Separation of Church and State*, 93 F.3d 617 (cross donated to city and dedicated war memorial violated Establishment Clause); *Houston ACLU*, 589 F.Supp. 222 (cross and Star of David as part of war memorial held to have no secular purpose); *Jewish War Veterans*, 695 F.Supp. 3 (non-religious symbol more appropriate than cross to honor servicemen on Marine Corps base); *Gonzales*, 4 F.3d 1412 (Knights of Columbus's intent to dedicate crucifix to fallen soldiers did not obviate its religious purpose).

The Sunrise Cross stands alone. It is in the middle of 1.6 million acres within the Preserve. There is nothing in the surrounding area, which would permit a reasonable viewer to infer its purpose as a war memorial, or as a non-religious symbol in general. Even if a reasonable observer had knowledge that the cross has a "history" as a war memorial, the reasonable observer would also know the cross's longstanding history as a site for devotional Easter worship services. Therefore, the current state of Sunrise Rock would lead a reasonable person to conclude that that cross is part of the Preserve and that the government, rather than a private entity, endorses religion, especially when viewed from Cima Road. *See Marshfield,* 203 F.3d at 495. Furthermore, the proximity of the cross to the Preserve, and the lack of visual definition between the federal government and the VFW, creates a perception of improper endorsement. *Id.* at 496.

Petitioners argue unpersuasively that recognizing the cross as a war memorial makes the cross "less religious." Many devout Christians, such as the Respondent in this case, would certainly take offense at such an attempt to trivialize or secularize the cross. It is preposterous to argue that "the government can avoid an establishment clause violation by 'dedicating' a religious object to a nonreligious group." *Mercier v. City of La Crosse*, 305 F.Supp.2d 999, 1008 (W.D. Wis. 2004), rev'd, 395 F.3d 693 (7th Cir. 2005). Adopting such a view would permit government bodies to erect crosses and build churches on public

property as long they could think of a new group to whom to dedicate each one. *Id.*

II. SECTARIAN SYMBOLS SUCH AS THE LATIN CROSS SANCTIONED BY GOVERNMENT AS WAR MEMORIALS NEGLECT THE SACRIFICES OF OUR NON-CHRISTIAN AND NON-BELIEVING VETERANS.

Notably, other famous war memorials without using any sectarian images make it clear to a reasonable observer that their sole purpose is to honor veterans. Such memorials include the National World War II Memorial, the Vietnam Veterans Memorial and the Korean War Veterans Memorial. Each is secular in nature and without any sort of religious reference, which ultimately offends no one and is respected by all. The lack of religious imagery within those memorial designs does not in any way diminish their significance or detract from the respect and honor shown for our veterans. Any Congressional action designating a monument to war veterans, therefore, can and should be free from religious iconography.

A. Recent Surveys Indicate That The Non-Religious Is The Fastest Growing Segment Of The U.S. Population By Religious Identification.

Congress's actions designating Sunrise Cross as a national memorial illustrate its failure to recognize

America's increasingly large secular population and to accommodate the changing demographics of the United States. Religious identification surveys indicate that at least fifteen percent or thirty-four million adult Americans are now non-religious. Less than seventy percent of Americans believe in a traditional theological concept of a personal God. The non-religious is the fastest-growing segment, by religious identification, in the U.S. population, according to the definitive American Religious Identification Surveys. *See* http://www.americanreligionsurvey-aris.org/ (last visited July 29, 2009).

Congress's actions in this case evidence favoritism toward one religion over another and religion over non-religion, in a manner which insults and excludes all non-religious and all non-Christian American veterans who have fought or died for our country. "When the government displays favoritism to one faith . . . it sends a chilling message to those in the minority that they are not full members of the community." *Lynch*, 465 U.S. at 688. This Court has observed that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963).

The Ninth Circuit correctly held in this case that the cross – even as a purported war memorial – is a sectarian war memorial that carries "an inherently religious message and creates an appearance of

honoring only those servicemen of that particular religion." *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993). The cross as designated as a national memorial by Congress, also tends to make "adherence to a religion relevant . . . to a person's standing in the political community." *Allegheny*, 492 U.S. at 594. Its presence as a war memorial "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 595. "Even if one strains to view the religious symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored . . . " *Eckels*, 589 F.Supp. at 235. The Sunrise Rock cross also excludes non-Christians and the "atheists in foxholes" who have also served in World War I with honor and distinction.

III. REMOVAL OF RELIGIOUS ICONOGRAPHY AND MESSAGES FROM PUBLIC PROPERTY IS THE ONLY TRULY EFFECTIVE REMEDY TO END LONGSTANDING ESTABLISHMENT CLAUSE VIOLATIONS.

It is no remedy to allow the federal government, or state, local and municipal governments, to sell, transfer or exchange public property which has long been host illegally to inherently religious symbols in order to cure egregious Establishment Clause violations. To be sure, the only truly effective way to

adequately divorce the government from the religious symbol is to order its removal.

Land sales, transfers or exchanges ("land sales") serve only to provide the government with a sham remedy to end serious constitutional violations. The government's endorsement remains unmistakable. Such remedies do nothing more than provide an environment that is ripe for government manipulation, as was even recognized by the Seventh Circuit in *Marshfield*, "We are aware, however, that adherence to a formalistic standard *invites manipulation*. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religions has actually ceased." 203 F.3d at 491. (emphasis added)

The land sale remedy encourages government lawyers and actors to find *any plausible* secular justification for the real estate transaction and it rewards government officials who conveniently omit from the legislative record any indication that their purpose is, in actuality, religiously motivated.[5] This remedy creates a "solution that . . . borders on a fraud." *See Mercier III*, 395 F.3d at 706 (Bauer, J., dissenting).

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[5] It is no surprise that virtually no legislative history appears to exist for the case at bar. Rep. Jerry Lewis, from California's 41st District, who sponsored all three Congressional Acts at issue, took a "no comment" approach, remaining silent about the proposals he authored and sponsored.

Moreover, supposed land sales create an incentive for governments and their actors – looking to dodge Establishment Clause violations while still promoting religion – to carve out and sell portions of valuable public property only to groups that it knows will maintain displays conveying inherently religious messages.[6] The district court in *Mercier I* warned that these transfers would permit Chief Justice Moore to "display the Ten Commandments in his courtroom so long as he could convince the state to sell a tiny portion of the courthouse to a private party and erect a disclaiming sign." 276 F.Supp.2d at 977-978. The district court further noted that the public land sales themselves send the message of government endorsement of a particular religious viewpoint. The court stated,

> "If anything, the sale of the parcel exacerbates the violation because it communicates

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[6] The district court in *Mercier II* presented a compelling hypothetical to illustrate this premise: "Suppose that the city were sponsoring a 'free speech' day in Cameron Park. Although all citizens could attend the event, the city would allow only those expressing Christian religious principles to speak. When other members of the community objected to the preferential treatment, the city did not open up the event to allow other groups to speak or cancel the event all together. Instead, the city sold a platform in the park and the land directly underneath it to a group that it knew would talk about Christian teachings. In an effort to avoid litigation, the city put up a sign disclaiming any endorsement of Christian views. In this hypothetical, there could be no dispute that the sale would violate the Establishment Clause." *Mercier I*, 305 F.Supp.2d at 1012.

> to non-adherents that not only is the City willing to display a Judeo-Christian symbol on public property, but it is also willing to carve up a public park to insure that the symbol does not have to be moved or share its space with displays expressing other viewpoints." *Mercier II*, 305 F.Supp.2d at 1013.

These types of sales give the government a huge loophole through which to escape constitutional violations. As Justice Souter observed in his concurring opinion, "by allowing government to encourage what it cannot do on its own, the proposed per se rule [of the plurality] would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself." *Capitol Square*, 515 U.S. at 792. In allowing the government to simply sell, transfer or exchange public property on which sectarian religious symbols improperly sit, this remedy does nothing more than camouflage the fact that the government is accomplishing exactly what it is prohibited from doing under the Constitution: endorsing and furthering one religion.

Land sales allow the government to not only continue to display inherently religious symbols on miniscule sections of private property within larger tracts of public property, but they also serve to demonstrate a preference for one particular group looking to express one particular viewpoint, which is

more often than not a religious viewpoint. Further, an additional "remedy" occasionally proposed, namely, adding disclaimers and other physical demarcations of private property, does not adequately diminish the religious message and perception of government endorsement. The only way for the government to directly and effectively end the Establishment Clause violation is to remove the symbol. The "complete physical separation between government and the offending object . . . addresses the concern at the core of such disputes – nonadherents' ability to use public space without disaffecting influence of the endorsed religious symbol." Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 Denv. U.L. Rev. 183, 227 (2004).

A. Government Initiated Real Estate Transfers To Pre-Determined Buyers Willing To Maintain Religious Displays Violate The Constitutional Prohibition Against Government Favoritism Of One Particular Group.

It is a fundamental principle of Establishment Clause jurisprudence that the government is prohibited from favoring religion over non-religion and a particular faith over all other faiths. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way in which 'establishes a [state] religion or religious faith, or

tends to do so.'"); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor J., concurring) ("[The endorsement test] does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."); *Abington*, 374 U.S. at 305 (Goldberg J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion over nonreligion."); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

The state action (the disposition of government property) must comply with these constitutional dictates. The stated purpose for the sale "cannot be a

sham to avoid a potential Establishment Clause violation." *See Gonzales*, 4 F.3d at 1419; *see also Rabun*, 698 F.2d at 1110 ("At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion. Although courts have rarely looked behind the stated legislative purposes, it is clear that an avowed secular purpose, if found to be self serving, may 'not be sufficient to avoid conflict with the First Amendment.'") (citations omitted). The land sale must not demonstrate favoritism and it must satisfy the test set forth in this Court's *Lemon* decision and recently reaffirmed in *McCreary*. *See Lemon*, 403 U.S. 602; *see also McCreary County v. ACLU*, 545 U.S. 844 (2005). This Court has previously recognized that the state action does not necessarily dissipate simply because public land transferred to private hands. *See Evans v. Newton*, 382 U.S. 296 (1966).

The land exchange in the instant case represents a cleverly devised subterfuge to disguise seventy years of flagrant constitutional violation. Congress not only showed favoritism when it went to "herculean efforts" to preserve the Sunrise Rock cross, but its action to exchange one acre of land upon which the cross sits to a private party also demonstrates Congress's preference for religion over non-religion and Christianity over all other faiths. Congress continuously intervened in this matter in order to preserve one religious message, to the exclusion of all

others, in the Mojave National Preserve.[7] In *Mercier I*, the district court judge correctly noted that the "Defendant sold a very small parcel of land in the middle of a park to a pre-determined buyer for the purpose of preserving *one* religious message." 276 F.Supp.2d at 976 (emphasis in original). Judge Crabb further observed that the " . . . defendant did not make the decision to sell because it wanted to foster the speech of all its citizens in the park but because it believed the sale was the only way to insure that the monument would stay where it is." *Id.*

The attempt to "patch up" an admitted violation of the Constitution with the shell game of land transfer produces an ugly kludge – an inelegant and overcomplicated solution to a simple problem. The obvious remedy, the constitutional solution, was for the VFW to move the cross to the nearby ranch

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[7] Congress took extraordinary action to intervene in the Sunrise Rock cross case, passing considerable legislation to prohibit federal funds from being used to remove the cross, to designate the Christian cross as a national memorial, and to initiate the land transfer. *See* Pub. L. No. 106-554, § 133; Pub. L. No. 107-248, § 8065(b); Pub. L. No. 107-117, § 137; Pub. L. No. 108-87, § 8121. Congress went so far as to divest invaluable federal land specifically dedicated as a nature preserve, which it had recently set aside, according to the California Desert Protection Act of 1994, as a "public wildland resource of extraordinary and inestimable value for this and future generations." *See* Pub. L. No. 103-433, § 2(a)(1). Congress, after its historic vote to preserve this natural desert bounty in 1994, is now inexplicably eager to carve up a parcel of this heritage of all the American people for the purpose of "saving the cross."

owned by one of its members, not for Congress to swap federal land under the cross for land on the ranch.

Congressional preference for favored religious speech cannot be sanctioned by manipulation. What if the Freedom From Religion Foundation were to illegally erect a towering "THERE IS NO GOD" sign in the middle of federal property and call it a memorial to recognize "atheists in foxholes" and in the U.S. military? What if offended onlookers sued and Congress responded with emergency steps to effect a land swap solely calculated to ensure the Foundation could continue to advertise its atheistic message surrounded by invaluable public land? No reasonable observer would conclude that this trespassing graffiti or Congress's actions to promote a "no God" message would therefore be constitutional. The same is true of land swaps that perpetuate religious endorsement.

B. No Amount Of Fencing Or Signage Can Disassociate The Government From The Religious Message Of An Intrinsically Sectarian Symbol Such As A Latin Cross, Nor Can Disclaim The Government Endorsement.

In an attempt to diminish the perception of government endorsement of religion, some courts have ordered governments to place disclaimers, usually signage, and to erect physical barriers such as fences to demarcate private property from public

property. This additional remedy is hopelessly ineffective. Particularly for purely religious symbols such as the Latin cross in Mojave National Preserve, "[n]o sign can disclaim an overwhelming message of endorsement." *Allegheny*, 492 U.S. at 619. "As a result, no matter how many fences or signs the [government and private entity] build, it is impossible to defeat the impression that the monument is still part of [the government's] property." *Mercier II*, 305 F.Supp.2d at 1019.

Justice Souter aptly observed in *Pinette*, " . . . the presence of a disclaimer does not always remove the possibility that a private religious display 'conveys or attempts to convey a message that religions or a particular religious belief is favored or preferred' when other indicia of endorsement . . . outweigh the mitigating effect of the disclaimer." 515 U.S. at 794. Even though Congress ordered a plaque to be erected at the Sunrise Rock cross site indicating its status as a war memorial, the pervasively sectarian nature of the "memorial" voids any disclaiming effect the plaque would serve.

Even if a court ordered the VFW to erect a fence surrounding the Sunrise Rock cross, or required additional signage, the inherently religious nature of the cross defeats any disclaimer. The very existence of such a disclaimer would prove the obvious perception of government endorsement. Furthermore, any reasonable person familiar with the history and context of the cross would know that Congress and the VFW went to herculean efforts to preserve a cross that

historically has been used solely for Easter worship services, despite its alleged status as a war memorial. Any disclaimer posted at the site would be useless. The dissenting opinion in *Mercier III* recognized,

> "The disclaimer seems to me to be taken from a scene in the movie, 'The Wizard of Oz' in which the phony wizard, whose fraud has been exposed, directs the onlookers to 'pay no attention to that man behind the curtain;' a disclaimer that is no more or less effective than the disclaimer on the monument. It too is an obvious sham." *Mercier III*, 395 F.3d at 706 (Bauer, J., dissenting).

The only effective way to end constitutional violations such as these is to order the government to remove the symbol from government property.

IV. EVEN IF THIS COURT DEEMS LAND SALES UNDER CERTAIN INSTANCES TO BE A PERMISSIBLE MEANS TO END CONSTITUTIONAL VIOLATIONS, THE NINTH CIRCUIT DID NOT ERR IN REFUSING TO GIVE EFFECT TO CONGRESSIONAL ACTIONS.

No court, including the Seventh Circuit, has sanctioned real estate transfers as a per se means of ending constitutional violations. Even under the analytical framework of *Marshfield*, if unusual circumstances exist, a land sale, transfer or exchange may not effectively cure an Establishment Clause violation. The Seventh Circuit reiterated in *Mercier*

III, " . . . there must be no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." 395 F.3d at 702. Such unusual circumstances include

> " . . . a sale that did not comply with applicable state law governing the sale of the land by a municipality, *id.*; a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership; or a sale well below fair market value resulting in a gift to a religious organization." *Id.*

To determine the validity of such a sale, the court in *Marshfield* evaluated the "form and substance" of the transaction to determine whether a land sale terminated the endorsement of religion. *Marshfield*, 203 F.3d at 491.

In the case at bar, the land exchange exudes unusual circumstances that render it an invalid remedy. Congress's first acts were to ensure no government funds would be used to remove the Christian cross and to designate the Christian cross as a national memorial. *See* Pub. L. No. 106-554, § 133 and Pub. L. No. 107-117, § 8137. Congress's further intervention to transfer the land benefits only one group, the VFW, under terms that require the VFW to keep a Latin cross displayed within a national public Preserve. *See* Pub. L. No. 108-87, § 8121. These terms also include a reversionary clause, which specifies should the VFW fail to maintain the property "as a war memorial, the property shall revert to the ownership of the United States." Pub. L. No. 108-87,

§ 8121(e). Congress had no other reason to exchange the land other than to maintain the location of a Latin cross. The prohibition of funding for the removal of the Christian cross, its national memorial designation and the reversionary clause in the land transfer agreement further evidence Congress's intent. Everyone understands that the Congressional Acts were only passed in order to preserve a religious message in the Preserve. These acts are further bolstered by the fact that Congress required no signs or demarcations, however inadequate to ensure no perception of government endorsement of Christianity. The actions uniformly show Congress's blatant refusal to separate itself from the display of a purely Christian monument and an attempt to evade a court injunction for the purposes of promoting religion. Therefore, the Ninth Circuit did not err in refusing to give effect to the intervening Congressional Acts.

Religious symbols do not belong in the midst of such a public preserve, nor should public preserves be carved up to promote the religious views of private individuals or groups favored by Congress. To overrule the Ninth Circuit in this matter would set in motion dangerous precedent, which would open the door to countless sham divestitures of public property in order to aid religion (inevitably, the dominant religion) in our country. Such a ruling would fail to safeguard not only the Establishment Clause, but also public land throughout the United States, which may have been usurped unlawfully for strictly

religious purposes. If the Court rules in favor of the Petitioners, interlopers would be assured that they too may be offered "first rights" and "sweetheart deals" to buy valuable property in a no-bidding situation, and gain access to public real estate in order to pursue their private religious purposes.

CONCLUSION

For the foregoing reasons, this Court should affirm the Ninth Circuit's decision holding that the land transfer statute did not adequately remedy the constitutional violation and permanently enjoining the government from completing the land transfer.

Respectfully submitted,

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APPENDIX A

Dispelling the Myth "There Are No Atheists In Foxholes"

The "atheist in foxhole" canard has been of special distaste to veterans who are not religious, including the Foundation's large veteran membership. They have written letters and spoken out when the cliché is thoughtlessly repeated in the media or by public officials. This phrase may have originated during the Battle of Battan in early 1942. It was also ascribed to World War II journalist Ernie Pyle. The phrase was used in the 1942 World War II movie, "Wake Island." But it is believed the phrase "there are no atheists in the trenches" dates back at least as far as World War I. In the Yale Book of Quotations, Fred R. Sparo, editor of "You Can Quote Them," notes "There are no atheists in the trenches," appeared in the Oakland Tribune, May 6, 1918, among other sources. (*See* The Yale Alumni Magazine, http://www.yalealumnimagazine.com/issues/2008_03/arts_quotations.html) This shows a longstanding bias in society against atheists and agnostics in the military dating to at least World War I. Congressional action which not only favors Christianity but deliberately excludes and marginalizes non-Christian veterans as well as nonreligious veterans is an affront not just to those individual veterans but to the Establishment Clause and its prohibition against a union between government and religion.

The Foundation's newspaper, Freethought Today (1984-present), has carried many articles by or about "atheists in foxholes," including:

- "Elmer Hochkammer: Foxhole Atheist" (April 1984), recounting how this Foundation member, a genuine "atheist in a foxhole," was severely wounded in the Battle of Bune in 1943.

- Larry Townsend, a Foundation member now living in Florida, who sent a letter to Peter Jennings of ABC News in 1996 after Jennings repeated the untrue assertion that there were "no atheists in foxholes." Townsend, who was living in Pearl Harbor when it was bombed in 1941 and joined the Marines, noted, "I was heavily involved in the war from the first minute to the last. I have seen a number of foxholes and I have been an occupant of a few and know for sure that there was at least one atheist in one of them." (June/July 1996)

- Ken Dunn, California, who enlisted in the Marine Corps in 1940, attaining gunnery Sergeant, and who served a six-year stint that involved some of the major Pacific battles of World War II, including Guadalcanal. Dunn wrote about coming under fire as a U.S. Marine in the first U.S. offensive in the Pacific, Guadalcanal, where there were 3,200 causalities in four days. During one battle, Ken's troops suffered fifty percent casualties. He noticed that the deaths were without respect to religious

views. He ordered his men to put away their prayer beads as they were landing and "get a firm grip on their weapon." When Ken requested an "A" for "Atheist" on his dog tags, he was told that was impossible and the space was left blank. ("Dog tags Without God: Outspoken Foxhole Atheist," August 1997; "Atheist in a Foxhole," October 1999).

- Foundation Lifetime Member Norman LeClair, of Florida, wrote his "Recollections of a None" (May/June 1988): "Looking back over a military career that spanned two wars and lasted twenty-plus years, I can't help but think about our government-subsidized religion and how it impacted so negatively on many of my experiences in uniform." He enlisted in the regular Air Force when the Korean War broke out and served through the Vietnam War, where he encountered prejudice against "nones." He was told by a chaplain's assistant upon his return from Vietnam: "Oh! You can't be a none. You can only be a Catholic, a Protestant or a Jew."

- Mike Hagen recounted his experiences as an atheist after joining the Navy in 1977. After he chose "no preference" for his designation, he was told at his first duty station at the ICU at Naval Regional Medical Center in Bremerton, Washington, that it was the policy of the ward to consider any "no preference" as "a nondenominational Christian." Offended, Hagan wrote the Department of Defense asking to change the "no preference" to "atheist." After sending three letters, his

category was changed to atheist by the direction of the Chief of Personnel in Washington, D.C. (May/June 1988)

- Donald O. Worrell, a Lifetime Member of the Foundation, Alabama, has participated in the Veterans History Project spearheaded by the Library of Congress. He was shipped overseas in November 1944, at age seventeen already a firm unbeliever, as a rifleman in the 7th Infantry Division. A month later, he found himself in the thick of the Battle of the Bulge in the freezing Ardennes Forest in Belgium. He was hit a few weeks later with a piece of shrapnel about the size of a quarter. After recuperating, he had many other close calls. He shot and killed a German soldier at close range in self-defense. A couple of other GI's rummaged through the dead soldier's papers and files, with one GI finding and taking the soldier's belt buckle, engraved "Gott Mit Uns" ("God With Us") as a war souvenir. Worrell received a Bronze Star with V for valor for his actions that night. From December 1944 to May 1945, Worrell encountered continual combat in what became known as "The Queen of Battle." (January/February 2005)

- Lifetime Member Lester Goldstein, Washington State, who retired as director of the School of Biological Sciences, University of Kentucky, was an aid-man in an infantry regiment during World War II who "saw a fair bit of combat." "That entailed exposure to numerous terrifying episodes, and I was

indeed quite fearful at those times. But it never occurred to me to call on God for protection." (October 2004)

- Asked Warren Allen Smith, a New Yorker, "Were there atheists in foxholes during World War II? Of course, as can be verified by my dog tags. A veteran of Omaha Beach in 1944, I insisted upon including 'None' instead of P, C, or J as my religious affiliation. My e-mail pal Arthur C. Clarke, the Commander of the British Empire who now is a Sri Lankan citizen, had 'None' on his tags, he tells me. In short, nontheists in Britain as well as the United States refused to be listed as members of any organized religion." (November 1997)

APPENDIX B

History of Atheist in Foxholes Monument

The Atheists in Foxholes monument in Lake Hypatia was unveiled on July 4, 1999. The monument is constructed from Georgia granite and was engraved by U.S. WWII veteran Bill Teague with the wording "In memory of ATHEISTS IN FOXHOLES and the countless FREETHINKERS who have served this country with honor and distinction. Presented by the national FREEDOM FROM RELIGION FOUNDATION with the hope that in the future mankind may learn to avoid all war." The monument features the insignia of all U.S. military branches and carries U.S. flags on top. The Atheists in Foxholes monument attracts veterans from around the country, who visit throughout the year and sign a book recording the names of veteran freethinkers, their military branch and years served. Every year since its placement, there has been a secular ceremony with veterans gathering by the monument on July 4th and reciting the original Pledge of Allegiance, which does not include "Under God."

This monument shares its history with the war memorial controversy and pending litigation over the Mt. Soledad cross. In July 1998, in part to honor its veteran members and in part to help remedy a long-standing Establishment Clause violation, the Foundation made a formal bid to the city of San Diego to purchase a tiny parcel of land under the forty-three-foot-tall Mt. Soledad cross, which had been sold to a private Christian group – a predetermined buyer.

When a court ruled that rigged sale was an unconstitutional ruse to "save the cross," the city announced sale of a larger parcel of land for the so-called purpose of construction of a war memorial, and opened the sale for bids.

The Foundation suggested a six-foot bronze statue of a freethought soldier atop a seven-foot granite base, with the wording:

> "In memory of ATHEISTS IN FOXHOLES and the countless FREETHINKERS who have served this country with honor and distinction. Presented by the national FREEDOM FROM RELIGION FOUNDATION with hope that in the future humankind may learn to avoid all war."

In making the bid, then-Foundation President Anne Nicol Gaylor wrote: "We've had so many memorials to Christians and to the glory of war. It is time for one for freethinkers that includes the idea of peace."

The winning bid for the parcel on Mt. Soledad, site of a forty-three-foot tall controversial cross, ended up going to the religious group which originally had been permitted to buy the 14x14 foot parcel of land under the disputed cross. The Foundation's bid was one of four rejected. Of the five bidders, three were Christian groups. That litigation is now entering its twenty first year, with courts continuing to rule against various tortured attempts to keep the cross at the highest point above San Diego.

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APPENDIX C

History of Atheist in Foxhole Award
Given Out by FFRF, Inc.

The Atheist in Foxhole award was inaugurated in 2006, at the suggestion of Vietnam War veteran and Foundation Board Member Steve Trunk, California. This award recognizes the service of atheist, agnostic and other nonreligious military personnel in the United States, and in particular those who fight Establishment Clause violations.

The first recipient was Philip Paulson, a Vietnam War vet, who had been an indefatigable plaintiff in what was then a 17-year state/church court battle in San Diego over the Mt. Soledad cross. In his acceptance speech, Paulson noted that he was "an atheist in a bunker" who survived the Battle of Dak To, one of the bloodiest battles of the Vietnam War, taking place between November 3-November 22, 1967. "I have seen people pray during a firefight. Those who prayed put their buddies' lives at risk." Paulson filed suit against the presence of the "Mt. Soledad Easter Cross" on public property. Cross supporters belatedly insisted the Latin cross a tribute to all war veterans. The complicated lawsuit is ongoing, with Trunk serving as one of the plaintiffs following the 2006 death of Paulson.

The second recipient of the Foundation's "Atheist in Foxhole" award is Jeremy Hall, age 24 when he received the 2008 award, who served two tours of duty in Iraq. Hall's attempt, approved by the proper

channels and receiving a permit, to start a freethought club at his base in Iraq was foiled by a Christian superior, resulting in litigation over discrimination taken by the Military Religious Freedom Foundation. Hall received so many threats from fellow enlistees in Iraq that he was put under around-the-clock protection and was removed to Ft. Riley, Kansas.

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

11

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, COLORADO, FLORIDA, IDAHO, LOUISIANA, MICHIGAN, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Colorado, Florida, Idaho, Louisiana, Michigan, South Carolina, Texas, and Utah respectfully submit this brief as *amici curiae* in support of the United States. The Latin cross war memorial at issue, like many, many other memorials and displays around the country, is a fitting tribute to soldiers who made the ultimate sacrifice in defense of our Nation. Using the Establishment Clause to require destruction of a war memorial that not even the plaintiff finds offensive exhibits unjustified hostility to the public display of religious heritage and insults the memory of those who gave their lives so that others might live free.

Religion is an inescapably significant component of American history and culture. Therefore, like the United States, State and local governments have frequently used religious imagery, texts, and allusions in erecting memorials, constructing monuments, hanging plaques, and maintaining frescos and murals that celebrate both their war dead and their histories and cultures. Such tributes remind citizens and newcomers alike not only of the price of freedom but also of where we came from and what our forbearers valued, and they do so using speech, symbols and context that citizens readily embrace and respond to. The Court's decision in this case will have a direct impact on the continued viability of monuments that have become fixtures of public venues around the country. A decision against the United States may even put some states and localities in the untenable position of having to

destroy substantial longstanding monuments that bear religious symbols.

The *amici* States thus have a compelling interest in defending the ability to commemorate their heritage, including battles to defend liberty, using symbols and texts (religious or otherwise) that effectively convey meaning to their citizens.

SUMMARY OF THE ARGUMENT

Establishment Clause standing doctrine seems to have spiraled out of control. Discussions of standing in Establishment Clause cases draw on "utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently." *Cf. Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S.Ct. 2553, 2573 (2007) (Scalia, J., concurring in the judgment). In *Hein* the Court brought discipline to Establishment Clause taxpayer standing. Here, the Court has an opportunity to erase still further the "blot on [its] jurisprudence" that Establishment Clause standing generally has become. *Cf. id.* at 2584.

In short, a plaintiff who is not offended by a memorial that uses religious imagery and rarely, if ever, sees the memorial, should not have standing to challenge its existence in federal court. Buono claims he is injured because another individual, a Buddhist, was not permitted to erect his own monument on public land. If the Buddhist individual had wanted to litigate this case, he could

have. Buono may not litigate on his behalf, and, more generally, mere offense at a government display should not constitute Article III injury.

On the merits, memorials on public land bearing religious symbols and texts abound throughout the United States. In cities such as Indianapolis, memorials to fallen soldiers, war heroes, and venerable statesmen decorate the public square with angels, scripture, and religious figures. Depending as it does on highly factual inquiries of government purpose, Establishment Clause doctrine provides little comfort that such seemingly benign uses of religious imagery would survive legal challenge. To avoid costly litigation, or to cure any violations that may be found, government agencies should be allowed to transfer the property in question to private organizations who have a desire to maintain the memorial. The alternative—destruction of offending monuments, many of which have stood for decades—would not only come at great cost to taxpayers, but would also create a culture of governmental hostility to the role of religion in our Nation's history and in the inspiration of its people.

Indeed, government agencies should not even be faced with decisions about whether to transfer vast numbers of public monuments bearing religious symbols to private hands or risk their destruction. Such monuments hardly convey government endorsement of religious creeds, much less coerce non-believers, but Establishment Clause inquiry into the subjective purposes of long-departed government officials, or even contemporary ones, pose a continuing threat to the legality of many public

memorials. Ultimately, however, inquiries regarding government purpose in Establishment Clauses cases have proven unworkable and indecipherable, not to mention untethered to constitutional text or history. In the context of challenges to religious displays, such inquiries should cease in favor of evaluating the likelihood of actual religious coercion.

ARGUMENT

I. Umbrage at the Government's Rejection of One Religious Display Should Not Confer Standing to Challenge Another, Otherwise Welcome, Display

A. The Court has rejected standing to challenge government land transfers based on psychological distress, and it should reject standing based on mere offense at government's management of its property

Establishment Clause plaintiffs, it is true, have in the past pursued claims for injunctive relief based on nothing more than having encountered offensive government displays on a regular basis. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 682 (2005); *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 852 (2005); *but cf. Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433 (1952) (plaintiffs as "citizens and taxpayers" did not have standing to challenge a state statute requiring readings from the Old Testament at the opening of each public school day, thus mere offense has not always been

cognizable Article III injury in Establishment Clause cases).

It is unclear where such a permissive "offense" standard originated. The decisions in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984), might seem to countenance implicitly that those who must encounter offensive religious images in public spaces suffer Article III injury, but in fact the lower courts in those cases focused entirely on *taxpayer* standing theories. *See ACLU v. County of Allegheny*, 842 F.2d 655, 656-58 (3d Cir. 1988); *Donnelly v. Lynch*, 691 F.2d 1029, 1030-32 (1st Cir. 1982). Alas, the Court has never specifically addressed the sufficiency of "mere offense" injury in a religious display case.

Furthermore, while permitting Article III standing in Establishment Clause display cases based on mere offense occasioned by regular visual contact is already quite a generous—and dubious—standard, Buono seeks to expand that notion even further. Buono, a practicing member of the Roman Catholic Church, is *not* offended by the Latin cross itself, and he does *not* regularly encounter it on his way to work. J.A. 64-65, 84-85. He claims to be "injured" instead because the National Park Service rejected an individual Buddhist's request to install a "stupa" (a dome-shaped Buddhist shrine) near the cross. J.A. 64-65; Pet. App. 4a-5a. And since the decision to reject the shrine is not something one can see, presumably he is equally offended by this situation whether he is at home in Oregon or near Sunrise Rock.

This abstract offense should not be enough for standing under any standard. On the particular issue of standing to challenge the alienation of property on Establishment Clause grounds, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), is most directly on point. In addition to rejecting taxpayer standing to challenge executive branch land transfers, the Court said that plaintiffs who allege no injury beyond the "psychological consequence presumably produced by observation of conduct with which one disagrees" do not have standing under Article III. *Id.* A similar "psychological consequence," of course, is all that Buono is able to allege, so he has no greater injury here than did the plaintiffs in *Valley Forge*.

That Buono sought to challenge the monument before it was transferred should hardly matter. Under *Valley Forge*, psychological distress occasioned by the government's management of its own property should not be enough to constitute Article III standing. *Id.* at 485-86. Nor is there any reason to stretch Article III standing in this context to avoid rendering the Establishment Clause unenforceable. Fear of religious coercion, or at the very least being a member of a captive audience, has long provided a better Article III foothold in Establishment Clause cases. *See Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (striking down Kentucky statute that required posting of the Ten Commandments on the wall of each public classroom in the state); *see also Lee v. Weisman*, 505 U.S. 577, 599 (1992) (striking down mandatory graduation prayer and benediction); *Sch. Dist. of Abington Twp.*

Pa. v. Schempp, 374 U.S. 203, 224-25 (1963) (holding Bible reading and Lord's Prayer incompatible with Establishment Clause bar against religious coercion); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (deeming official school prayer inconsistent with Establishment Clause).

In fact, the entire range of circumstances where plaintiffs have suffered genuine Article III injury owing to an alleged Establishment Clause violation demonstrates how needless "mere offense" standing really is. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (finding no Establishment Clause violation by a law requiring religious entities to bear the cost of collecting and remitting a generally applicable sales and use tax); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (holding that a Massachusetts statute granting religious bodies veto power over applications for liquor licenses violates Establishment Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (rejecting state-imposed registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from nonmembers).

Federal Courts are meant to provide a forum for remedying genuine injuries, and nothing more. The Establishment Clause does not vitiate that limit on federal judicial power by providing disgruntled citizens "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge*, 454 U.S. at 487. Conferring standing here, where the plaintiff has no injury distinguishable from any

other citizen offended by the war memorial cross, would backslide Article III doctrine and render federal courts agents of Establishment Clause prospectors.

B. Even if Buono does have standing, he cannot challenge the existence of the cross on its own merits

Even if Buono has suffered Article III injury, the limited nature of that injury should still have a direct impact on the permissible scope of his claim. By claiming offense at the rejection of a Buddhist individual's proposed stupa, but not at the Latin cross itself, Buono limits the case to an evaluation of whether the cross, or the conveyance of the land containing the cross, is valid in light of that rejection. That is, because he is not offended by the cross, but is instead only offended at the presence of the cross in light of the rejection of the Buddhist stupa, he has no real basis for challenging its presence on public land, or the conveyance of that public land to the VFW, independently. The remedy implicated, therefore, is not an injunction against the cross, but against the government's rejection of the Buddhist stupa, which would be the most straightforward remedy for Buono's asserted injury. In essence, then, Buono is invoking the interest of the Buddhist applicant in having the stupa at Sunrise Rock.

Buono has not, however, met the requirements for such *jus tertii* standing. Outside of free-speech overbreadth doctrine, litigants may assert the interests of others only if they first establish "a close

relation to the third party" and "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). The rejection of third-party standing is "designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig v. Boren*, 429 U.S. 190, 193 (1976). Also, "if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim [could] be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984). And perhaps most importantly, requiring "that a party seeking review must allege facts showing that he is himself adversely affected . . . serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

The Court applied third-party standing limits in a Religion-Clause case as far back as *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961), where it precluded the plaintiffs, who alleged economic injury owing to Sunday closing laws but who "d[id] not allege any infringement of their own religious freedoms," from advancing free exercise claims because "[t]hose persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights." Buono's Establishment Clause claim is similarly unjustified. He has not even bothered to assert that he has a

close relationship with the Buddhist individual, or that such individual is unable to pursue his own remedies. *Cf. Pleasant Grove City, Utah v. Summum*, -- U.S. --, 129 S.Ct. 1125 (2009) (adjudicating a claim by a religious organization hoping to place a religious monument on public land already containing the Ten Commandments). Buono should not be permitted to take up the cause for him—even in the guise of his own "offense" at the rejection of the shrine—and force an adjudication that the Buddhist applicant, the most proximate "victim" of the allegedly unlawful government acts, does not seek.

II. Many Longstanding State and Local Monuments with Religious Imagery May be Vulnerable if Buono Prevails

Across the country, state and local parks, squares, cemeteries, government buildings, and schools boast monuments honoring soldiers who gave the "last full measure of devotion" to their country so that the rest of us may live free. Many of these monuments contain religious imagery, including crosses, Stars of David, citations to scripture, angels, and the like. These memorials not only honor veterans but also have their own historical and artistic value, and all have emotional significance to the groups who helped procure or commission them. A ruling for Buono would deny these groups the opportunity to maintain memorials that they value in the event the monuments are found to establish religion.

The decision to erect a war memorial on public land often involves local civic and religious groups that raise the necessary funding and design and commission the memorial. *See* Jay Alan Sekulow and Erik M. Zimmerman, Pleasant Grove City v. Summum: *Upholding the Government's Authority to Craft Its Own Message Through Privately Donated or Funded Monuments, Memorials, and Artwork*, 3 Charleston L. Rev. 175, 176 (2009). It is common for both subtle and obvious religious imagery to be embedded within the resulting memorials since they reflect both historical context (including religious culture) and the interests of the groups involved. *See Van Orden v. Perry*, 545 U.S. 677, 689 (2005) (listing examples of monuments with religious imagery in the Nation's Capital). Countless memorials located on public lands, therefore, contain religious symbolism and may be at risk of a judicial order for removal or destruction.

1. Indianapolis is a city fond of war memorials, the most famous being the Soldiers and Sailors monument on what is now called Monument Circle which commemorates the valor of Hoosiers who fought in all wars prior to World War I. The city also boasts the Congressional Medal of Honor Memorial and the USS Indianapolis National Memorial. The Indiana War Memorial Historic District, located on state property in downtown Indianapolis, includes 24 acres of monuments, statues, sculptures and fountains, including the gargantuan Indiana War Memorial and, of particular significance to this discussion, the Indiana War Memorial Obelisk and the Schuyler Colfax memorial.

Built of black granite, and completed in 1930, the Obelisk is a post-World War I symbol of regeneration of the Nation. *See* National Register of Historic Places, Indiana World Memorial Plaza Historic District, 6, http://nps.gov (last visited on June 4, 2009). The Obelisk is one hundred feet tall and has four bas-relief bronze panels at its base. *Id.* Designed by Henry Hering, these panels represent the four fundamentals on which the nation's hopes are founded: Law, Science, Religion, and Education. The Law panel depicts Moses holding tablets representing the Decalogue. Religion is portrayed by a woman and girl praying in front of a Celtic cross.

Nearby in University Park is a monument to Schuyler Colfax, the Speaker of the United States House of Representatives who signed the resolution proposing the Thirteenth Amendment, and who later served under Ulysses S. Grant as the Seventeenth Vice President of the United States. The statue, erected by the Independent Order of Odd Fellows and unveiled in 1888, is centrally located in University Park, which is publicly owned. *Id.* at 10-12. At the base of the statue are symbols representing Faith, Hope, and Charity, as well as a prominent bronze medallion depicting a scriptural scene of Rebekah at the well giving a drink to Isaac's servant.

In short, both the Obelisk and the Colfax statue are owned by the government, rest on state ground, and plainly bear religious text or imagery. Hopefully no successful court challenge to either will arise, and certainly the State maintains that neither poses an Establishment Clause problem. As Establishment

Clause doctrine now stands, however, the legal analysis may well depend on who attended the dedication of the memorials and what they said. If either were declared an Establishment Clause violation, a sensible solution would be to convey each to a sympathetic group (such as the American Legion, whose national headquarters sits amidst the War Memorial District, or the Odd Fellows, who commissioned the Colfax statue) who would be likely to maintain it as-is.

Under the doctrine advocated by Buono, however, successful Establishment Clause challenges would mean destroying these monuments, and many others like them across the country, by sand-blasting offensive religious allusions or dynamiting them altogether, at considerable financial and moral costs to citizens and taxpayers. In this vein, it is worth noting that crude physical destruction was the self-help remedy of choice for a disgruntled citizen who objected to a Ten Commandments monument on the Indiana State House lawn. *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 768 (7th Cir. 2001), *aff'd*, 259 F.3d 766 (7th Cir. 2001). In the event the Court affirms the decision below, thus would untold numbers of monuments to important historical figures and ideas meet their demise, taking with them encomia to genuine American experience, not to mention national morale.

2. Military symbols often have religious overtones, so it is unsurprising that many statues and memorials—both those dedicated to soldiers and others—contain religious imagery. *See* Br. of Veterans of Foreign Wars of the United States, *et. al.*

as *Amicus Curiae* in support of Petition for Certiorari 7-11. The most obvious example is the Latin cross, such as that at issue here, which is a prevalent image in war memorials owing to its status as a military symbol for sacrifice. *See, e.g., Eugene Sand and Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346-47 (Or. 1976).

Poignant monuments bearing crosses are everywhere on public property. For example, West Perry High School in Pennsylvania has a Veterans Memorial Grove, which features memorials to World War II, Korea, Vietnam, and the military actions in Mogadishu. *See* Pennsylvania Department of Military and Veterans Affairs, West Perry High School Monuments, http://www.milvet.state.pa.us (last visited on June 4, 2009). Students participated in the design, construction, and dedication of these monuments as cross-curriculum projects involving History, Art, English, and Music. *Id.* The World War II memorial, dedicated in 1995, consists of a cross draped in a United States flag. *Id.* Particularly given its relatively recent vintage, this is exactly the sort of monument that might be rendered vulnerable to destruction by a decision favorable to Buono. Such community projects should be commended, not vilified.

New York City is home to the massive Father Francis Patrick Duffy statue honoring this chaplain-soldier who served in the Spanish-American War and World War I. Father Duffy is depicted holding a bible in his hand and he is standing in front of a 17-foot tall Celtic cross. *See* New York City Dept. of Parks & Recreation, Father Duffy Statue,

http://www.nycgovparks.org (last visited on June 4, 2009). If a court were to find this public display unconstitutional, one would hope the city could convey it to a private group, as happened in *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 491, 497 (7th Cir. 2000), where the court held valid the sale of public park land containing a statue of Jesus.

The Mount Soledad Veterans Memorial Cross in San Diego has been the subject of numerous lawsuits, with litigation occurring in both California and Federal courts for over a decade. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1204 (S.D. Cal. 2008), *appeal docketed*, Nos. 08-56415 and 08-56436 (9th Cir. Aug. 27, 2008). The district court held that Congress had the secular purpose of honoring war veterans in transferring the land to private ownership, and that the cross does not violate the Establishment Clause regardless. *Id.* at 1221.

3. Other types of religious allusions also show up on war memorials. The citizens of Wentzville, Missouri, established one of the first Vietnam Veterans memorials in the United States in 1967, and their monument consists of a single column topped by a carved eagle with Ruth 1:16 carved in its base: "Whither thou goest I will go." *See* Vietnam Veterans Homepage, Vietnam Veterans Memorial; Wentzville, Missouri, http://www.vietvet.org (last visited on June 4, 2009). An eternal flame monument outside of the Baldwin County Courthouse in Alabama is inscribed with "Dedicated to the Glory of God and in Honor of the Veterans of All Wars." *See* Craig Myers, *Veterans Honored at*

Several Events in Bay Minette, al.com, November 11, 2008, http://www.al.com/news (last visited on June 4, 2009). The Delhi Township Veterans Memorial Park in Ohio is the site of a Wall of Honor dedicated in 2007 that consists of five marble walls prominently displaying in large letters "In God We Trust." *See* Delhi Township Veterans Association, Veterans Memorial Park & Monuments, http://www.delhiveterans.com (last visited June 4, 2009).

And there are more. The Vietnam Veterans Memorial Bridge in West Sacramento, California, is inscribed with "May they forever rest in peace in the bosom of our Lord." *See* Bridges – Vietnam Veteran's Memorial Bridge – Ryan E. Galt, http://www.worldwidepanorama.org (last visited June 4, 2009). The Veterans Memorial in Rocky Ripple, Indiana, contains "A salute to those known but to God." *See* Rocky Ripple Veterans Association, http://theripple effect.net (last visited June 4, 2009). The Veterans Memorial in Williams Township Pennsylvania contains an inscription of John 15:13: "Greater love has no one than this, that one lay down his life for his friends." *See* Lehigh Valley Military Affairs Council, Williams Township Monuments, http://www.lvmac.org (last visited June 4, 2009).

This is just a sampling of the religious symbolism that is prevalent in American war memorials. One can only imagine how many similar monuments exist on state and local government land in small towns and big cities throughout the country. If the presence of the cross on Sunrise Rock violates the Establishment Clause, so may many other monuments. If similar lawsuits are filed, after

protracted and expensive court battles, local or state governments who lose the Establishment Clause lottery would have two options: first, they might transfer the land on which the memorial sits to a private party; or second, be forced to destroy or remove the monument. Destruction or removal of every such instance of religious symbolism would sterilize public land of important cultural references and reflect hostility to religion.

War memorials, significant for their artistic and historical value, are also the location of ceremonies honoring soldiers who sacrificed their lives for this Nation. Unsurprisingly, therefore, veterans groups have proven willing and interested in maintaining such monuments by accepting conditional land transfers. Such groups should not be seen as "straw purchaser[s]," Pet. App. 82a-83a, or as tools to avoid the Establishment Clause, but as collections of soldiers who wish to preserve pieces of history that have served generations of men and women as a source of comfort. The Court should permit them, once again, to come to the aid of their fellow citizens. *Cf. Regan v. Taxation with Representation,* 461 U.S. 540, 551 (1983) ("Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages.").

III. The Court Should Abandon Establishment Clause Inquiry Into Government Purpose

In refusing to give effect to the Act of Congress providing for transfer to private hands of the land on

which the cross sits, the Ninth Circuit agreed with the district court's holding that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 84a. Thus, when evaluating the government's actions, the court inferred a government intent to preserve the cross and, presumably, to endorse its religious message. This "government purpose" test, however, leads to inconsistent and unfair results. The Court should abandon it in favor of a test that more meaningfully inquires whether a government display "establishes" religion, such as by asking whether it is coercive.

A. The purpose test leads to inconsistent and unfair results

1. This case is about a cross on public (or formerly public) land, so it is fitting first to examine how other similar displays have fared under current doctrine. First, of course, is the case most directly in conflict with this case, *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000), where the court held that a conveyance of public land containing a statue of Jesus Christ to a private religious organization was valid. The court found that a covenant running with the land requiring upkeep and maintenance of the statue was compliant with state law, which compliance in turn suggested a benign government purpose. *Id.* at 492-93. Here, the Court found that a similar covenant betrayed a *nefarious* government purpose. *See* Pet. App. 82a-83a. One sale was valid,

the other not, based on an infinite number of attitudinal indicators suggested by the circumstances.

Other cross cases similarly demonstrate the futility of achieving consistent and just outcomes using the purpose test. In *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 349 (Or. 1976), the court permitted a city park to display a large cross because, notwithstanding any earlier improper purposes, a new secular purpose had emerged to justify its display. But in *Gonzalez v. North Township of Lake County*, 4 F.3d 1412, 1414-15, 1421 (7th Cir. 1993), the court rejected a city park's claim that it was displaying, as a war memorial, a crucifix donated by the Knights of Columbus because a Knights spokesperson (not a public official) had referred to the cross in religious terms twenty-eight years earlier. Because of the purpose test, one government may display a religious symbol for secular reasons, while another may not. There is little predictability in this doctrine.

2. Unfortunately, the Court's recent decisions applying the purpose test to Ten Commandments displays have only muddied the waters further. In *Van Orden v. Perry*, 545 U.S. 677, 681 (2005), the Court permitted the Texas State Capitol to display a Ten Commandments monument because it found a valid secular purpose to display a series of monuments representing the state's political and legal history. On the very same day, in *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 850-51, 881 (2005), the Court held that a display of the Ten Commandments as part of a series of monuments in

a Kentucky courthouse did not have a valid secular purpose. Thus, Texas was permitted to display the Ten Commandments amongst other displays while Kentucky was not.

Applying these opinions and the purpose test to subsequent cases has proved to be a considerable challenge for the lower courts. Indeed, confounded by the ten separate opinions in *Van Orden* and *McCreary*—and, perhaps, inspired by the biblical milieu—lower courts have described the current state of the law as both "Establishment Clause purgatory," *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005), and "limbo," *Green v. Board of County Commissioners of Haskell*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006). Lower courts have been left to wade into this "murky, turbulent water," *Weinbaum v. Las Cruces Public Schools*, 465 F. Supp. 2d 1116, 1127 (D.N.M. 2006), with little guidance as to how to apply the purpose test in a way that will lead to clear, consistent results. Unsurprisingly, therefore, results in the wake of *McCreary* and *Van Orden* have been anything but consistent.

For example, as with *McCreary* and *Van Orden* themselves, the secular context in which a monument with religious overtones is displayed has sometimes been found to mitigate the appearance of government religious endorsement and, at other times, to be nothing but an attempt by government to sneak around the Establishment Clause. In *O'Connor v. Washburn University*, 416 F.3d 1216, 1228 (10th Cir. 2005), the court upheld a statue allegedly hostile to Roman Catholicism because

nearby secular displays would give a reasonable observer the sense of being in a museum rather than amidst government denigration of a particular religious faith. In *ACLU v. Grayson County, Ky.*, 2008 WL 859279, at *9 (W.D. Ky. 2008), however, the court rejected a courthouse "Foundations of American Law and Government" display that included the Ten Commandments with other documents because "[a]n objective observer would understand that the Foundations Display's sponsor desired to post the Ten Commandments in the Courthouse for purely religious reasons." Meanwhile the Eighth Circuit found a Ten Commandments monument standing *alone* to be constitutional—but not without dissent. *ACLU v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 (8th Cir. 2005); *id.* at 780-81 (Bye, J., dissenting).

To put it mildly, there is logical tension in the notion that the Establishment Clause permits one locale, Plattsmouth, to display a Ten Commandments monument without any kind of secular context, but prohibits another, Grayson County, from doing so even in context with other historical documents, and permits still a third, Washburn University, to maintain a monument hostile to religion because it is set amongst other statues. Yet the government purpose test, and the current state of Establishment Clause doctrine generally, make such results inevitable.

In order to avoid such incomprehensible outcomes, courts sometimes treat religious symbols as predominantly secular. In *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1260 (D. Utah

2007), the court held that twelve-foot-tall crosses placed on public land in memoriam to police officers who died in the line of duty did not violate the Establishment Clause because crosses for burial have a predominantly secular meaning. The court compared the crosses to Christmas trees, finding that over time their religious meaning has become subordinate to a secular one. *Id.* at 1258. That courts must decide when a cross ceases to be religious suggests a need to rethink Establishment Clause doctrine.

3. States and other government entities also find it difficult to know what types of monuments are permissible and whether certain words or actions on their part will cause an otherwise permissible monument to run afoul of the Establishment Clause. In Indiana, the federal courts enjoined replacement of a Ten Commandments monument destroyed by vandals because the Governor, when announcing the replacement monument (which also included the Bill of Rights and the Preamble to the Indiana Constitution) said the Ten Commandments represented "core values." *Ind. Civil Liberties Union v. O'Bannon*, 110 F.Supp.2d 842, 847 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001). Unfortunately, factual as they are, *Van Orden* and *McCreary* provide no real guidance concerning the correctness of those lower court decisions.

Accordingly, the purpose test encourages state officials to keep silent when adding monuments to government land—and certainly to keep clergy away from the dedication—lest a comment about the monument, or the mere presence of a religious

figure, be misinterpreted as religious endorsement. *See, e.g., McCreary*, 545 U.S. at 869; *see also ACLU v. Rowan County, Ky.*, 513 F. Supp. 2d 889, 892 (E.D. Ky. 2007) (lack of ceremony and officials present during initial display of monument was critical to finding of no religious purpose); *but see Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008) (finding secular government purpose despite presence of clergy at dedication of monument). Promoting silence is not consistent with the mission of educating the public, which is the fundamental reason for having monuments in the first place.

B. The purpose test has shifted over time

The purpose test, which originated with the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and was later refined by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring), isn't what it used to be. Its metamorphosis over the years provides another reason to reexamine it.

1. In *Lemon*, the Court accepted the government's asserted secular purposes because such claims must "be accorded appropriate deference." 403 U.S. at 613. Later, in *Lynch*, the Court observed that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was *motivated wholly* by religious considerations." 465 U.S. at 680 (1984) (citations omitted) (emphasis added). After observing that "[t]he narrow question is whether there is *a* secular purpose for Pawtucket's

display of the crèche," the Court took Pawtucket at its word that it sponsored the display to "celebrate the Holiday and to depict the origins of that Holiday." *Id.* at 681 (emphasis added). Notably, the Court held "only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires" and specifically disclaimed Pawtucket's need of an *exclusively* secular purpose. *Id.* at 681 n.6.

The Court has at times reaffirmed this deferential approach. In *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988), the Court sided with the government because, even if the Adolescent Family Life Act "was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns." Similarly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 249 (1990), a plurality of the Court agreed that the Equal Access Act's religious activity protections were justified by the secular purpose of preventing speech discrimination notwithstanding that some legislators may have wanted to protect religious speech in particular: "[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *See also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (observing that even "a statute that is motivated in part by a religious purpose" may be valid).[1]

---

[1] *Widmar v. Vincent*, 454 U.S. 263 (1981), is instructive as well. The Court held that providing religious groups with access to a state university's

This line of cases yields a relatively light standard whereby "the Court is "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Yet this has not been the operative consideration in all cases.

2. The Court has at times undertaken a more searching analysis and attempted to look behind the plausible or stated purposes of government action to discern the government's supposed *actual* purposes. The Court has also employed a comparative test whereby it attempts to discern the *primary* purpose for governmental action supported by both religious and secular purposes.

In *Stone v. Graham*, 449 U.S. 39, 41 (1980), for example, the Court rejected the asserted secular purpose behind posting the Ten Commandments on public school classroom walls, saying that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." The Court arrived at this conclusion notwithstanding its acknowledgement that the Ten Commandments may be part of a public school curriculum for multiple secular reasons. *Id.* It simply chose not to defer to the government's asserted secular purpose.

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open forum would be permissible because doing so "would have a secular purpose." *Id.* at 271 & n.10. This implies that any improper purposes that administrators might also have would be irrelevant.

Similarly, in *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987), the Court accepted the notion that states could require public schools to teach creation science under the pure secular purpose of promoting skeptical inquiry. Nonetheless, the Court second-guessed Louisiana's stated secular purpose for its creation-science law because, based on a few comments by the legislative sponsor, it deemed the Act's "primary purpose" to be endorsement of religious beliefs. *Id.* at 592-94. The Court even listed in detail possible sources of information for discerning in future cases the primary purpose behind assertedly secular legislation. *Id.* This approach evinces a skeptical attitude that is far different from the deferential approach of *Lemon*, *Lynch*, *Bowen*, *Mergens* and *Mueller*.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected a public school's stated secular purpose for permitting a student message or invocation at football games. The school policy declared that the purpose was to solemnize the event, and the Court acknowledged that this purpose was "entitled to some deference." *Id.* at 306, 308. Nonetheless, the Court ultimately concluded that, because prayer is the most obvious way to solemnize an event, because the policy specifically permitted an "invocation," and because the school had a prior policy of permitting student-led prayer at football games, the "specific" purpose of the policy must have been to preserve a religious practice. *Id.* at 309. Particularly significant in *Santa Fe* was the Court's assertion that these factors

made it "reasonable" to infer that a religious purpose underlay the policy. *Id.*

Thus, while *Mueller* ruled that the Court should be reluctant to second-guess a plausible secular purpose, *Santa Fe* ruled that the Court could do so as long as it was merely "reasonable" to infer that a religious purpose may have existed. As professor Steven Smith has written, "[i]t is far from clear how a court can be expected to distinguish sham purposes from sincere ones when it is also required to 'defer to . . . stated intent.'" Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 286 (1987) (quoting *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring)).

The Court's more recent opinions in *Van Orden* and *McCreary* have done nothing to clarify the issue. In *McCreary*, as in *Stone*, *Edwards*, and *Santa Fe*, the Court looked past the stated secular purpose behind the Ten Commandments displays and even went so far as to analyze the events surrounding the two *previous* versions of the displays. *See McCreary*, 545 U.S. at 868-71. The Court found that the presence at the dedication ceremony of a pastor who testified to the existence of God was evidence of the religious purpose behind the prior and current displays. *Id.* at 869. It even considered documents that the Counties chose *not* to include in the display, such as the Fourteenth Amendment and the original 1787 Constitution, and held that the omission of these documents and inclusion of others would lead the casual observer to "suspect that the Counties were simply reaching for any way to keep a religious

document on the walls of courthouses constitutionally required to embody religious neutrality." *Id.* at 872-73. This broadening of the purpose test to include not just analysis of the display itself but conjecture as to why other monuments or displays were not chosen instead demonstrates just how far afield of the deferential *Lemon* test Establishment Clause doctrine has run.

In *Van Orden*, by contrast, the Court held that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." 545 U.S. at 686. Without explaining why the test was "not useful," the Court went on to evaluate the monument's constitutionality in the context of its nature and the role of religion in the nation's history. *Id.* at 686-692. Citing *Lynch*, the Court noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. Thus, without looking to the government purpose behind the display of the monument, the Court held that Texas's display of the Ten Commandments monument did not violate the Establishment Clause. *Id.* at 692. This approach is much more in line with the Court's earlier, more deferential, Establishment Clause cases and was issued on the same day as *McCreary*, a decision that is anything but deferential. It is no wonder, therefore, that lower courts and government entities alike have had difficulty squaring these opinions and knowing when and how to apply the government purpose test.

3. The "taint" doctrine is part of the purpose test's problematic metamorphosis.

As mentioned, the Court in *Santa Fe* ascribed religious purposes to an assertively secular school policy in part because the policy at one time had provided for student-initiated prayer. 530 U.S. at 309. But obsessive focus on long-ago stated purposes and the history surrounding prior displays deviates substantially from the Court's earlier understanding of the purpose test. In particular, in *McGowan v. Maryland*, 366 U.S. 420, 444-47 (1961), the Court upheld Maryland's Sunday closing laws because, regardless of the religious origins of such laws, a secular justification had emerged over time. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 41 (2004) (O'Connor, J., concurring in the judgment) (stating that even if some legislators voted to add "under God" to the Pledge of Allegiance out of religious motivations, "[a]ny religious freight the words may have been meant to carry originally has long since been lost.").

Indeed, this focus on the legal history of monuments and the long-ago stated purposes behind them leads to unfair results for states who attempt to cure Establishment Clause violations. In *McCreary*, the Counties attempted to cure an earlier Establishment Clause problem by displaying the Ten Commandments amongst other more secular monuments. 545 U.S. at 855. However, despite focusing on these curative acts, the Court instead based its decision on the earlier problems and found that the display still violated the Establishment

Clause because at some prior point the government evinced an intent to endorse religion.

Although the Court stated in *McCreary* that past action does not forever taint a monument, it provided no guidance as to what measures should be taken to cure an Establishment Clause violation. *Id.* at 873-74. Lower courts, likewise, have been hesitant to provide any guidance of their own. *See, e.g., ACLU v. Garrard County, Ky.*, 517 F. Supp. 2d 925, 945 (E.D. Ky. 2007) (holding that history and context leave open the factual claim that an otherwise permissible Foundations Display violates the Establishment Clause); *Green*, 450 F.Supp.2d at 1288 (noting the "difficult questions" surrounding whether or not new displays have a "constitutional strike against them"); *Grayson County*, 2008 WL 859279, at *9 (holding history and context make the Foundations Display violate the Establishment Clause). Thus, government officials are essentially required to get it right on the first try when they wish to display a monument or document with any sort of religious content, which again encourages silence about new monuments.

C. The purpose test is inherently unsuitable for detecting "establishments" of religion

The Court's varying applications of the purpose test reflect the extraordinary difficulty of applying the test and, more to the point, the test's vulnerability to manipulation (even if unintentional) and its inherent inability to provide equal justice over time. These are systemic problems that follow

from the lack of a well-understood connection with the values underlying the Establishment Clause.

1. The most obvious difficulty in applying the secular purpose test (as understood in, *e.g.*, *Stone*, *Edwards*, and *Santa Fe*) is to divine the supposed actual or prevailing purpose of a government official or body. Judges applying the purpose test probe deep into a government body's political culture, legislative history, interpretations and statements regarding the law, historical context, and even the fit between the act and its secular ends. The objective is to unravel an infinite variety of complementary, intertwined purposes and determine not just what they are, but which among them is "primary."

That judges undertake to determine whether the articulated secular purposes of public officials (who are equally under oath to uphold the Constitution) are nothing but a "sham" implies institutional distrust and deeply offends comity. *Edwards*, 482 U.S. at 586-87; *see also id.* at 610 (Scalia, J., dissenting) ("[T]he Court today holds . . . that the members of the Louisiana Legislature knowingly violated their oaths and then lied about it."). That courts often must grope for the actual purposes of entire legislative bodies and not just individual government officials turns the implausible into the futile. *Id.* at 637 (Scalia, J. dissenting) ("To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."). It is inherently unjust for constitutionality to turn on a single legislator's (or government executive's) ill-conceived comment in support of a law or a display,

as if the resulting law were the "fruit of a forbidden tree." *Id.* at 638.

A plurality of the Court may have backed away from such an incredulous approach in *Mergens*, where the Court upheld the Equal Access Act notwithstanding the religious motivations of some who voted for it. 496 U.S. at 249-50. But even the *Mergens* plurality ultimately reasoned that having a religious *motivation* is distinguishable from having a *purpose* of advancing religion. *Id.*; *but see, e.g.*, *Lynch*, 465 U.S. at 680 (articulating the purpose test in terms of motivations). The supposed distinction is that, while the Establishment Clause prohibits government from advancing religion, it does not enjoin government officials from pursuing secular policies with religious motives. *See Edwards*, 482 U.S. at 614-15 (Scalia, J., dissenting) (contrasting cases that speak of activities "endorsing," "advancing," or "establishing" religion from secular policies pursued for religious motives, such as providing for the homeless).

Requiring courts to find a blurry line between the two is yet another impediment to principled, consistent adjudication. Indeed, if courts fail to draw the motive/purpose distinction accurately, the purpose test may ultimately result in judicial decisions that effectively exclude the religious from political participation. *See id.* at 615. Regardless, the purpose test is laden with entirely subjective inquiries, making it highly susceptible to unequal applications.

2. The impossibility of applying the secular purpose test with objectivity and consistency rests in part on its questionable jurisprudential rationale. "It is . . . far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong." *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting). The endorsement test as a whole has been derived from the notion that the Establishment Clause exists in part to prevent religious minorities from feeling like "outsiders." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The implicit theory for including a secular purpose component appears to be that, regardless of the effect of government action, the mere existence of a religious purpose alone can somehow exclude or create outsiders.

Even aside from the conceptual riddle of how a religious purpose can exclude when the effect does not, the Establishment Clause roots of the "outsider" premise are far from clear. For example, Steven Smith wrote that the Establishment Clause had once been "primarily concerned with maintaining proper institutional relations." Smith, *Symbols*, *supra* at 299. He describes the "outsider" premise as reconceiving the Establishment Clause as a source of individual rights rather than as a regulator of institutional relations. *Id.* Professor Michael Paulsen has argued that, even if it is intended to advance religion, if government action has no religiously coercive impact, "the Establishment Clause supplies no justification for outlawing it," and "[t]he purpose prong of *Lemon* thus serve[s] no

legitimate function[.]" Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 803 (1993); *see also, e.g.*, Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L.J. 1667, 1720-21 (2006) (arguing that the focus on religious division is misguided because divisive state policies on hot button issues are "an unremarkable staple of political life in our democracy"); Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 Tex. Rev. L. & Pol. 93, 106 (2007) ("Requiring an inquiry into purpose arguably generates unwarranted litigation with little societal benefit").

In light of the secular purpose test's rather shaky jurisprudential foundation, it is no wonder that enforcement varies so wildly: Courts are unsure what the doctrine is ultimately trying to achieve.

D. Historical displays with religious connotations should be judged only as to whether they represent actual religious coercion

Particularly because the purpose test suffers from deep and insoluble practical problems leading to unjustified disparate treatment of similar government displays, the Court should, with respect to display cases at least, discard the endorsement test entirely and consider employing instead the coercion test proposed by Justice Kennedy in his *Allegheny* opinion. *County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (describing parameters of coercion test). *See also*

Van Orden, 545 U.S. at 693 (Thomas, J., concurring) ("The Framers understood an establishment necessarily to involve actual legal coercion.") (citation and internal quotation omitted). Doing so would not only result in greater equality across jurisdictions, but it would also provide government officials with more predictable outcomes.

The Court has understood the Establishment Clause to permit government traditions having religious significance because of its appreciation for the secular dimensions and common acceptance that also characterize those traditions. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1982), in particular, ruled that legislatures may hire a chaplain to conduct legislative prayer because Congress and state legislatures have engaged in that practice throughout our history. *Marsh* held that a government's "tolerable acknowledgement of beliefs widely held among the people of this country" will not offend the Establishment Clause. *Id.* Similarly, the "common sense of the matter" permits the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust." *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952); *see also Marsh*, 463 U.S. at 792; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (stating that the "history and ubiquity" of practices with religious significance enables them to convey a message related to common secular culture rather than religion).

As set forth in Part II, *supra*, state and local governments all over the country have a long and rich tradition of displaying tributes to our religious

roots and heritage. For these reasons, the coercion test can safely be used in government display cases as a safeguard against presentations that go too far. As long as the display, new or old, does not "coerce anyone to support or participate in any religion or its exercise," it should be permitted under the Establishment Clause. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

As for the display at issue here, it seems obvious that a cross in the middle of the desert does not coerce support for religion. Had the coercion test been the rule of law, this lawsuit probably would not have been wending its way through the court system for the last 8-plus years, much less would the courts below have faulted the government for taking steps to put the display in private hands.

* * *

Our Founders created secular government and disestablished religion, but their own religious learning profoundly influenced their actions and the endurance of the Republic. Like nearly all government tributes to religious heritage, the Latin cross here is fully consonant with the First Amendment: It coerces nobody, creates no impression of religious endorsement, and belongs to a government tradition with rich secular significance. To compel its destruction is to condemn thousands of similar monuments around the country through unnecessary hostility to religious heritage.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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Dated: June 8, 2009

AMICUS CURIAE BRIEF

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No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The International Municipal Lawyers Association (IMLA), previously known as the National Institute of Municipal Law Officers, is a non-profit, professional organization of over 2,500 local government attorneys, most of whom serve as corporate counsel for municipalities in the United States. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, including by advocating the nationwide views of local government on legal issues. IMLA has appeared as a friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA submits this brief to provide the Court with an understanding of the challenges faced by municipalities in reasonably addressing potential Establishment Clause violations without destroying a wealth of local landmarks, some of which are of great historical and sentimental value. This *amicus* brief sets forth information about public monuments representative of those in municipalities around the na-

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[1] Counsel for all parties received notice of the *amicus curiae's* intention to file this brief. This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted consent for the filing of this *amicus* brief in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus curiae* submitting this brief and its counsel hereby represent that no party to these cases nor their counsel authored this brief in whole or in part, and that no person other than *amicus* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

tion that could be at risk depending upon this Court's decision. This *amicus* brief also explains the importance to IMLA's members of this Court's recognition that municipalities must have reasonable alternatives in remedying Establishment Clause violations.

STATEMENT OF THE CASE

In 1934 the Veterans of Foreign Wars ("VFW") erected a wooden cross and signs near it which read "The Cross, Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of the Veterans of Foregin [sic] Wars, Death Valley post 2884" in a remote location of the Mojave National Preserve ("Preserve"). *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008). Over the course of the last seventy-five years, the memorial cross has been replaced several times by private parties. *Id.*

In 2001, Frank Buono, who rarely encounters the memorial and is not personally offended by the symbol, filed suit against the Secretary of the Department of the Interior and the Superintendent of the Preserve (collectively, "National Park Service" or "NPS") alleging that the presence of the cross on federal land was a violation of the Establishment Clause. *Id.* at 770. The District Court held that the presence of the cross on public land violated the Establishment Clause, and the court enjoined NPS from any further display of the cross. During the pendency of the District Court litigation, Congress passed laws designating the cross as a national memorial and preventing NPS from using federal funds to remove the cross. *Id.* at 770-71. In September 2003, while the case was pending before the Ninth Circuit, Congress, in an apparent attempt to remedy the Establishment Clause violation, passed another law directing NPS to affect a land exchange between

the Preserve and a private party, making the VFW the owner of the property on which the cross stood. *Id.* at 771. As part of the exchange, Congress included a reversionary clause that "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." *Id.* There was no obligation to maintain the cross itself. *Id.* After the passage of this law, Buono moved to enjoin the land transfer. *Id.* at 773. The District Court determined that the land exchange was invalid and permanently enjoined NPS from proceeding with the land exchange. *Id.* NPS appealed the April 2005 injunction to the Ninth Circuit. *Id.* In September 2007, a panel of the Ninth Circuit affirmed the judgment ordering the injunction. *Id.* at 783.

In May 2008, the Ninth Circuit issued an Order Amending the Opinion and Amended Opinion (the "May 2008 Order"). *Id.* at 759. The May 2008 Order was notable in that it deleted text indicating overt disagreement with the Seventh Circuit's "presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion'" as announced in *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). *Buono*, 527 F.3d at 759 (quoting *Marshfield*, 203 F.3d at 491).

SUMMARY OF THE ARGUMENT

The presumptive propriety of transferring land from public to private landholders as a means to remedy potential Establishment Clause violations is not only legally supported, it is a critical curative mechanism for governmental entities seeking a legitimate option short of razing historically significant memorials or displays. To effectively erase the pre-

sumption in favor of such land transfers, as the Ninth Circuit did in *Buono*, needlessly places countless monuments in jeopardy, their fates only determinable through a long, expensive, and burdensome litigation.

The presumption employed in *Marshfield* is appropriate under existing Establishment Clause jurisprudence because it properly recognizes that the core of any Establishment Clause violation is government, as opposed to purely private, action. Thus, a transfer of the land containing a display that violates, or may violate, the Establishment Clause terminates government entanglement with the display and should be a presumptively valid means of curing any Establishment Clause violation.

While the amended Ninth Circuit decision in *Buono* purports not to conflict with the Seventh Circuit's *Marshfield* test, in practice the decision deviates markedly. Rather than approaching the land transfer at issue in this case with a presumption that such transfer constituted a legitimate means of curing an Establishment Clause violation, as the Seventh Circuit would have done under *Marshfield*, the Ninth Circuit engaged in an exacting review of the government's underlying intent, erecting an improper hurdle for any similar transfer. *Buono*, 527 F.3d at 779, 781-83. This intent-based analysis is not only at odds with the Seventh Circuit's approach in *Marshfield*, it is inconsistent with existing Establishment Clause jurisprudence. Practically, it creates a presumption against curative transfers: governmental intent to preserve a monument with religious symbols by transferring it to a private party undoubtedly would be suspect under this inappropriate approach.

In applying the *Marshfield* test in *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701-02 (7th Cir. 2005), the Seventh Circuit specifically declined to hold that a governmental entity's land transfer intended to keep an offending monument in place invalidates the transaction as violative of the Constitution. The Ninth Circuit's focus on the intent of the land transfer ignores the key fact that a legally valid transfer of land to a private entity terminates government action with respect to any display constituting an Establishment Clause violation, thereby eliminating any excessive government entanglement with religion. In addition, by focusing on the intent of the governmental entity involved in the transfer, the Ninth Circuit effectively ensures that any attempt to cure an apparent Establishment Clause violation via a legitimate land transfer will only serve to further embroil the governmental entity in additional Establishment Clause litigation.

Municipalities across the country contain memorial displays, many of which have religious references or symbols. If this Court were to adopt the Ninth Circuit's fact-specific, intent-based analysis of land transfers as a means of curing Establishment Clause violations, these municipalities will be left with no reasonable means of avoiding litigation based on these monuments and displays. A municipality that owns public land upon which such a memorial display exists logically will be left only with one of three costly and unappealing choices. First, the municipality could allow the monument to remain in place and be forced to risk eventually defending an Establishment Clause suit seeking removal. Second, the municipality could engage in a land transfer and be forced to risk defending an Establishment Clause suit involving a burdensome, fact-specific inquiry into the

municipality's intent in engaging in the land transfer. Third, the municipality could raze the monument or display, destroying a piece of American history while still being potentially burdened with the cost of defending a suit alleging that the municipality's action constituted governmental hostility toward the religion at issue. The Establishment Clause simply cannot require that municipalities be put in such an untenable position.

More importantly, an intent-based standard as applied to a governmental entity presumes unanimity, or at least a consensus, of action. In this case, some members of Congress may well have intended to preserve a Christian icon, but the President may have intended to simply avoid further litigation. Similarly, at the local government level, members of councils, mayors, executives, and other elected officials can, as this Court does, coalesce in a result for many reasons. As such, attributing intent to such bodies is not appropriate. The Court should weigh only the result, and, in this case, devolution of the monument resolves the Establishment Clause problem.

This Court should adopt the Seventh Circuit's *Marshfield* analysis, establishing the presumptive validity of land transfers as a means of curing Establishment Clause violations.

ARGUMENT

I. LAND TRANSFERS TO CURE APPARENT ESTABLISHMENT CLAUSE VIOLATIONS SHOULD BE PRESUMPTIVELY VALID.

"Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom*

From Religion Found, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000); *see Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005). This analysis comports with existing Establishment Clause jurisprudence and provides a practical means for a government to extricate itself from involvement with a display that potentially violates the Establishment Clause while allowing the historical benefit of the display to remain.

This Court has long recognized that an Establishment Clause violation can only occur when the conduct at issue involves governmental, as opposed to purely private, endorsement of religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) ("[A]n Establishment Clause violation must be moored in government action of some sort."); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). Thus, when government involvement with a violation of the Establishment Clause ceases, any Establishment Clause concern is also necessarily extinguished.

In reaching its conclusion that a land transfer is a constitutionally effective remedy to an Establishment Clause violation, the Seventh Circuit in *Marshfield* properly acknowledged the distinct difference in treatment between public speech and private speech, noting that the expression is imputed onto the entity holding legal title over the property:

> Because of the dramatic difference in the treatment of private religious expression and govern-

> ment religious expression, we recognize the effect of formal transfer of legal title to property as a transfer of imputed expression from a public seller onto a private buyer. Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.

203 F.3d at 491. The Seventh Circuit's inquiry into the validity of a land transfer as a means to cure an apparent Establishment Clause violation thus presumed, in the absence of facts evincing a sham transaction, that the transaction itself was valid and not subject to a constitutional analysis because the land in question was no longer under the control of the government.[2] This presumption of validity comports with the treatment of Establishment Clause concerns by courts in similar contexts. *See, e.g., Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1259-60 (10th Cir. 2005) (holding that the government cured a First Amendment issue by selling land that had previously been a public forum to a church).

As a measure to avoid "manipulation" of this presumption in favor of the validity of land transfers, and to ensure that any governmental action has ceased and that the land transfer is not merely a sham transaction, the Seventh Circuit recognized the need to examine whether the sale of the land from the state to a private organization demonstrates "continuing and excessive involvement between the government and private citizens" such that the

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[2] This reading of the rule allows municipalities and other governmental entities to affect a land transfer at the point at which they receive viable information or complaints that the structure in question poses an Establishment Clause violation.

transaction was a mere sham which itself constituted a separate Establishment Clause violation. *Marshfield*, 203 F.3d at 492. Specifically, the court noted the sorts of improprieties that would typically be sufficient to warrant disregard of a purported land transfer transaction, including: whether the sale was in accordance with applicable state laws, whether the sale was for fair market value, and whether the transaction involved a mere straw purchaser while the government continued to exercise all of the duties of ownership. *Id.*

In a subsequent decision applying the *Marshfield* test, the Seventh Circuit in *Mercier* specifically rebuffed the assertion that "because the [government] knew that the sale would keep the Monument in its challenged location, the sale itself favored the religious purpose of the Monument, and thus that act was unconstitutional." *Mercier*, 395 F.3d at 702. The Seventh Circuit stated:

> The desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is always an option, but as *Marshfield* holds, it is not a necessary solution to a First Amendment challenge. The court in *Marshfield* approved the sale when removal was obviously an option . . . .

Id.

Thus, in *Marshfield*, the Seventh Circuit ultimately held that the transfer of 0.15 acres of city park property on which a statue of Christ stood was a valid termination of a public endorsement of religion because the sale complied with applicable state laws, was a sale for fair market value, and the municipality no longer exercised any duties of ownership. 203

F.3d at 492. The presumption of the validity of a land transfer to cure an apparent Establishment Clause violation was similarly reiterated in *Mercier*, where the court found the land transfer valid after analyzing the validity of the sale, location of the monument, purchaser, and efforts made to distinguish the private from the public land. 395 F.3d at 702-04.

In crafting the *Marshfield* test, the Seventh Circuit adhered to existing Establishment Clause jurisprudence while also providing governments with the flexibility to cure apparent Establishment Clause violations without wide-spread destruction of long-standing, historically significant memorials and displays that incorporate religious symbols or references. For, as this Court has long held, the Establishment Clause does not require hostility toward religion. *Van Orden v. Perry*, 545 U.S. 677, 683-84 (2005) (plurality opinion); *id.* at 698-99, 704 (Breyer, J., concurring in the judgment); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). Similarly, the Establishment Clause cannot possibly require the wholesale destruction of this country's historically significant memorials and displays when a simple land transfer can easily eliminate any excessive government entanglement with an apparent endorsement of religion resulting from the retention of such memorials and displays on public lands.

II. THE NINTH CIRCUIT'S APPROACH IN *BUONO* IS NOT WARRANTED BY THE ESTABLISHMENT CLAUSE AND HAS PROFOUND IMPLICATIONS FOR THE COUNTRY'S HISTORIC MEMORIALS AND DISPLAYS.

The Ninth Circuit in *Buono* fundamentally misapplied the *Marshfield* test and effectively eviscerated

any presumption of the validity of a bona fide land transfer as a means of curing an Establishment Clause violation. Instead of such a presumption in favor of curative land transfers, the Ninth Circuit approach essentially presumes the opposite: that any land transfer resulting in the retention of a religious symbol on once public land is a sham transaction. The Ninth Circuit's approach to analyzing curative land transfers (1) is inconsistent with the Seventh Circuit's approach and is not warranted by existing Establishment Clause jurisprudence and (2) effectively requires the destruction of any now publicly-owned display that violates the Establishment Clause.

A. The Ninth Circuit's Approach Is Inconsistent With Existing Establishment Clause Jurisprudence.

Although the Ninth Circuit opinion purports to examine only whether there is a continuing Establishment Clause violation, there is plainly another element in play. Only slightly beneath the surface is the Ninth Circuit's substantial concern about whether the government was "seeking to circumvent the injunction in this case" by maintaining the memorial cross. *Buono*, 527 F.3d at 782. The Ninth Circuit endorsed the District Court's seeming reproof of the government's Herculean efforts to preserve the memorial cross. *Id.* Under this analysis, a governmental body's substantial efforts to preserve a memorial by removing it from government control are themselves effectively an endorsement of religion and necessarily a formula for the destruction of the memorial.

Improperly focusing on the intent of the governmental entity—as opposed to whether the First

Amendment violation is remedied by the transfer—is directly at odds with the Seventh Circuit's approach and is inconsistent with Establishment Clause jurisprudence.[3]

The line between an analysis under the Establishment Clause and the Free Speech and Free Exercise Clauses is wholly dependent on who has title of the land. *See Marshfield*, 203 F.3d at 491; *see also Buono*, 527 F.3d at 762 (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (finding that, under Supreme Court precedent, "the only relevant issue is whether there is a continuing state action, absent which the government's intent or any atypical circumstances are of no consequence"). Accordingly, unless the land transfer from a public entity to a private entity was fundamentally a sham, the transaction is presumptively valid and does not require a

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[3] Though the Ninth Circuit's basis for focusing on the government's intent in engaging in a land transfer transaction is not clear from the face of the *Buono* opinion, the court may have drawn upon the "secular purpose" element of the Establishment Clause test articulated by this Court in *Lemon v. Kurtzman*. 403 U.S. 602, 612-13 (1971). Making one element of *Lemon* arguably dispositive in testing government action specifically meant to remove any potential sponsorship of religion is, however, baseless. *See Hunt v. McNair*, 413 U.S. 734, 741 (1973) (noting that the factors identified in *Lemon* are "no more than helpful signposts"); *see, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983) (not applying the *Lemon* test); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same). It is also worthy of note that the *Lemon* test is only one of several approaches the Court has taken in Establishment Clause cases. *See generally Van Orden*, 545 U.S. at 684-85 (plurality opinion) (discussing the varied history of the *Lemon* test in Establishment Clause cases). In any event, governmental efforts to preserve established memorials, regardless of any religious underpinnings, are certainly consistent with a secular purpose.

more searching analysis. *See, e.g., Marshfield*, 203 F.3d at 491 ("Because of the difference in the way we treat private speech and public speech, the determination of whom we should impute speech onto is critical."). This result is reasonable under existing Establishment Clause jurisprudence and is demanded by the Free Exercise and Free Speech Clauses because a refusal to recognize a private citizen's purchase of land at fair market value based on the purchaser's desire to retain a religious symbol on the land would diminish that person's legal rights based on his or her desire to express his or her religious views.[4]

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[4] This Court has long held that discrimination against a private individual or entity based on that individual's or entity's religious expressions or beliefs violates the First Amendment. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down city ordinances barring ritual animal sacrifice as violative of the Free Exercise Clause because the ordinances targeted religious conduct for distinctive treatment. *See* 508 U.S. 520 (1993). In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court ruled that a school district could not exclude religious organizations from displaying after school films based solely upon the religious nature of the films in question. *See* 508 U.S. 384 (1993). Similarly, in *Rosenberger v. University of Virginia*, the Court held that a university's refusal to fund a student publication because of that publication's religious perspective violated the First Amendment. *See* 515 U.S. 819 (1995). Thus, under the First Amendment, it cannot possibly be permissible for a court to invalidate a land purchase by a private purchaser, such as the VFW, based on that purchaser's desire to retain a religious symbol on the land. Such a holding would amount to court sanctioned discrimination against the purchaser based solely on the purchaser's religious convictions, which is anathema to the First Amendment and contrary to existing First Amendment jurisprudence.

Removing government entanglement with religion and endorsement thereof is sufficient to cure any concerns under the Establishment Clause because permitting religious symbols to be displayed on privately owned land is not offensive to the First Amendment. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); *see generally City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Mergens*, 496 U.S. at 250 (plurality opinion)); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 779 (O'Connor, J., concurring) ("[O]ur Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry."). Searching the government's intent in a land transfer is irrelevant absent an independent violation of the Establishment Clause.

B. Adoption of the Ninth Circuit's Intent-Based Approach Leaves Governmental Entities in an Untenable Position Regarding Displays That May Violate the Establishment Clause.

Should the Court adopt the Ninth Circuit's approach, municipalities seeking to divest themselves of displays that potentially constitute Establishment Clause violations would be subjected to precisely the type of judicial "bait-and-switch" of which the dissenting judges warned in the *Buono* denial of rehearing *en banc*. *See* 527 F.3d at 767.

If the Ninth Circuit's analysis of land transfers is adopted, municipalities with war memorials having any potential religious markers will find themselves

in the pernicious position of deciding whether to raze the memorial and become subject to a lawsuit alleging they are inhibiting religion or speech, to maintain the memorial and become subject to a lawsuit alleging they are endorsing religion, or to attempt to cure the possible Establishment Clause violation by transferring the land to a private entity and nonetheless find themselves litigating the matter on a transaction-by-transaction basis. At its core, the Ninth Circuit's approach prevents municipalities from curing any Establishment Clause violation by means of a land transfer by voiding the underlying sale precisely because the sale was entered into to alleviate the violation.

In addition, there is a fundamental fallacy in inquiring into "the intent" of any governmental entity because such an inquiry presumes unanimity or consensus of purpose. In this case, each member of Congress may have had his or her own intent in passing the statute in question while the President may have had yet another intent in signing the statute into law. Similarly, at the local government level, members of councils, mayors, executives, and other elected officials can, as this Court does, coalesce in a result for many reasons. Divining the subjective motivation of a legislature in enacting a statute is "almost always an impossible task" because "[t]he number of possible motivations, to begin with, is not binary, or indeed even finite." *Edwards v. Aguillard*, 482 U.S. 578, 637-38 (1987) (Scalia, J., dissenting). Thus, "[t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id.* at 638 (Scalia, J., dissenting). In a case such as this, the Court should weigh only the result and not attempt to speculate as to the motivation by which

that result was reached.[5] In this case, devolution of the monument resolves the Establishment Clause problem which properly concludes the inquiry.

Thus, it is clear that the Ninth Circuit simply ignored the legitimate rights of other governmental bodies to craft remedies to perceived Establishment Clause violations. This Court should adopt the Seventh Circuit's analysis and application in *Marshfield* and hold that "absent unusual circumstances," which in themselves are independent Establishment Clause violations, land transfers affected to end or avoid Establishment Clause violations are presumptively valid. In this way, municipalities can both operate in accordance with the Constitution and avoid needless re-litigation of these matters.

III. THE NINTH CIRCUIT'S HOLDING PRESENTS EXTENSIVE PRACTICAL PROBLEMS FOR LOCAL GOVERNMENTS AND MUNICIPALITIES.

The practical implications of the Ninth Circuit's holding for governments and municipalities across the United States are extensive. Local governments—most of which operate on modest budgets—are ill-equipped to handle the flood of expensive litigation which would likely result if the Ninth Circuit's holding becomes the law of the land. Allowing a government to remedy an Establishment Clause violation with a bona fide land transfer is not only consistent with fundamental First Amendment jurisprudence

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[5] Indeed, contrary to the Ninth Circuit's speculation in this case, there is no evidence that Congress had any purpose in ordering the land transfer other than to preserve a historic war memorial.

but also provides a bright-line practical solution that will allow local governments to avoid costly litigation.

According to the United States Census Bureau's 2007 Census of Federal, State, and Local Governments, there were 89,527 governments counted in the United States in 2007, of which 89,476 were local governments.[6] U.S. Census Bureau, Governments Division, 2007 Census of Governments (2008), http://www.census.gov/govs/www/cog2007.html.

With thousands of monuments in the United States (many of which are situated in small municipalities), local governments face the daunting prospect of spending enormous portions of their already strained budgets on litigation—as opposed to schools, infrastructure, and public safety.[7]

By way of example, Wentzville, Missouri houses one of the first Vietnam Veterans memorials in the United States, which was originally dedicated in December 1967. *See* Michele Viehman, Vietnam Veterans Memorial, Wentzville, Missouri, http://www.vietvet.org/momem2.htm (last visited June 3, 2009). As it stands today, the memorial consists of a single column of red Missouri granite, topped by the carved figure of an eagle. *Id.* Inscribed on the column's base is: "Whither thou goest I will go. Ruth 1:16." *Id.* The

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[6] A census of governments is taken at 5-year intervals pursuant to 13 U.S.C. Section 161. According to the 2002 Census of Federal, State, and Local Governments, only 87,525 local governments existed in 2002. U.S. Census Bureau, Governments Division, 2002 Census of Governments (2002), http://www.census.gov/govs/www/cog2002.html.

[7] Not to mention the costs—both economic and emotional—of being forced to obliterate many of the country's oldest and most-cherished monuments.

city of Wentzville's population as of the 2000 census was 6,896.[8] Though the Census Bureau projects that Wentzville's population grew to 22,478 as of 2007, Wentzville's total budget revenues for 2009 are only $68,031,106, with no more than $260,000 budgeted for all court expenses. City of Wentzville, 2009 Annual Budget (2008), http:// www.wentzvillemo.org/ city_budget/budget_2009.pdf. Litigation over the monument might not be an acceptable financial option for the community. Wentzville, like so many other communities, must have reasonable alternatives.

The ramifications of burdening bona fide transfers would also fall upon large municipalities which, are home to some of the nation's most renowned possessions. The Liberty Bell, unquestionably one of the most recognized symbols of American history, is owned by the City of Philadelphia[9] and is cared for by the National Park Service under a Memorandum of Agreement. While the bell was placed in service in 1753, the bell was not bestowed the name "Liberty Bell" until 1835 when abolitionists named the bell and adopted it as their symbol because of its inscription, which reads: "Proclaim Liberty throughout all the Land unto all the Inhabitants thereof. Lev. XXV

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[8] U.S. Census Bureau, Missouri by Place, GCT-PH1. Population, Housing Units, Area, and Density: 2000, http:// factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US29&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-format=ST-7&-mt_name=DEC_2000_SF1_U_GCTPH1_ST7&-_sse=on (last visited June 3, 2009).

[9] The City of Philadelphia's 2009 Estimated General Fund Revenues are approximately $3.88 billion, with only $16 million allocated to the "Law Department." City of Philadelphia, The Mayor's Operating Budget Summary for Fiscal Year 2009 (2008), http://www.phila.gov/reports/pdfs/Adopted_Budget_in_Brief. pdf

X."[10] It is difficult to conceive that any court would find Philadelphia's ownership and open display of this monument, prominently inscribed with a scripture verse, violative of the Establishment Clause.[11] If, however, public ownership was found to be an Establishment Clause violation, the Ninth Circuit's reasoning might well conclude that transferring the bell to a private owner was impermissible. After all, Philadelphia's intent in the transfer undoubtedly would be, in some degree, to preserve The Liberty Bell for public viewing. Such an alarming result would have no foundation in established jurisprudence—which highlights the flaws in the Ninth Circuit's analysis.

The Ninth Circuit's holding—that a bona fide land transfer is not a remedy for an alleged Establishment Clause violation—deprives local governments of a sensible and fiscally responsible solution.

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[10] The quote is taken from Leviticus chapter 25, verse 10 of the King James version of the Bible. *See* U.S. National Park Service, Independence National Historic Park - Liberty Bell Center (Mar. 27, 2008), http://www.nps.gov/inde/liberty-bell-center.htm.

[11] Demonstrating a violation of the Establishment Clause is made easier by the Ninth Circuit's holding that the only showing a potential plaintiff must make to demonstrate standing is offense to the presence of a religious symbol on federal land.

CONCLUSION

For the foregoing reasons cited herein, the Court should reverse the ruling of the Ninth Circuit.

Respectfully submitted,

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June 8, 2009

AMICUS CURIAE BRIEF

No. 08-472

Supreme Court U.S.
FILED
AUG 3 - 2009
OFFICE OF THE

IN THE

Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* JEWISH SOCIAL POLICY ACTION NETWORK SUPPORTING RESPONDENT

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INTEREST OF *AMICUS*[1]

The Jewish Social Policy Action Network ("JSPAN") is an organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one, and in which members of all minority faiths were constantly reminded of their outsider status by prominent governmental displays of religious symbols.

In Europe especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church/state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken to prevent any erosion of the separation of church and state principles embodied in the Establishment Clause. Critical to this effort is that the courthouse doors remain open to those seeking to enforce government neutrality in church/state matters.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, most recently in this Court in *Pleasant Grove City, Utah v. Summum*, No. 07-665; and members of JSPAN's Church/ State Policy Center have done so in scores of such cases over the past 50 years.

ARGUMENT

A. Standing

1. Mischaracterizations of the Record Relating to Standing May have Caused the Court to Grant Certiorari Improvidently.

This *Amicus* agrees fully with Respondent's argument that Appellants, having chosen not to seek review in this Court of the standing ruling embodied in the *Buono I* final judgment, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), cannot now relitigate that issue. This brief argues that even if it were otherwise, Mr. Buono had standing.

Statements by Appellants in their Petition and/or their Brief are seriously at odds with the record. Among them are assertions that "respondent objects to displaying the cross on public property *only because that property is not an open forum*" (Br. 10; Pet. 9); that his alleged injury was "*simple exposure to the lack of a public forum*" (Br. 17); that he "*seeks only to assert the right of others*" (Br. 10; Pet. 10, 14) and to "*vindicate a view of the Establishment Clause – one that requires public property to be open to all, if to any, religious symbols*" (Br. 13).

Moreover, Appellants' counsel deposed Mr. Buono and attempted to elicit testimony supporting a thesis that even though no such violation was pleaded, this case is really about Free Speech, not the Establishment Clause. They failed, totally, yet in their Petition and Brief they describe his testimony not as it was but as they wish it had been. We reference relevant portions of his deposition which are included as an Appendix to this brief.

a) This is Not an "Open Forum" Case, and Mr. Buono's Injury was Not "Simply Exposure to the Lack of a Public Forum."

Appellants could not have misunderstood what offended Mr. Buono. In his deposition he made clear beyond the slightest doubt that he knew well the difference between "open forum" and "religious preference" principles and that this was not an "open forum" case (Dep. Tr. at 12, 83-85, 91-94), that he was a religious, church-attending, Roman Catholic who obviously does not find a Cross standing out in open space offensive (Dep. Tr. at 146-147), and that it was government's promotion of religion (Dep. Tr. at 160-161), its preference of one religion over all others, "the display of a Latin Cross on Government owned property . . . not open to others," that so deeply offended him (Dep. Tr. at 69, 73, 81, 83, 89, 104, 118-120).

b) Mr. Buono did Not Sue to Vindicate a Personal Ideological View of the Establishment Clause or to Assert the Rights of Others, But to Prevent Injury to Himself.

Of course it may be said of all plaintiffs that they seek to vindicate their view of the law. But like any other plaintiff, Mr. Buono also seeks to redress a very personal injury he himself has suffered.

In both the Petition and Brief (Pet. 9-10; Br. 13), Appellants argue that Mr. Buono, as a practicing Roman Catholic who respects the Cross, is asserting no injury-in-fact to himself but rather is only asserting other people's rights. To understand how religious preferences cause injury not only to the non-preferred but to believers of the preferred faith as well, the latter need only consider how angry and offended they would be were the government to permit symbols of other faiths but not theirs – say Stars of David and Buddhist Stupas but not Latin Crosses – to be displayed on public land. Knowing how such conduct by the government would offend them, it cannot be that they must acquiesce, simply stand by and suffer the spiritual bruising caused by government when it does to others, in their name, what they would never willingly allow government to do to them. If they refuse to acquiesce and instead institute suit, it cannot be seriously claimed that they are basing their claim on some ideological notion, some idiosyncratic view of their own, and not on one of the central beliefs of their religion (and virtually all religions), the Golden Rule. (*E.g.*, Judaism: Talmud, Shabbat 31a; Buddhism: Udama-Varga 5:18;

Confucianism: Analects 15:23; Christianity: Matthew 7:12, Luke 6:31; Hinduism: Mahabharata 5:1517; and Islam: Number 13 of Imam "*Al-Nawawi's Forty Hadiths*").[2]

Appellants correctly quote Mr. Buono's testimony that he is a practicing Roman Catholic who does not "find the Cross, itself, offensive" (Dep. Tr. at 146). What they infer from that testimony is that "(r)espondent has disclaimed any spiritual injury stemming from the display . . . of the Cross." Pet. 13. Not a word in the record supports that inference. Clearly it is the government's exclusive preference of Christianity that offends him (Dep. Tr. at 83), so much so that - as the district court found - rather than come into contact with the stand-alone Cross, he chooses to drive on a different road. Pet. App. 123a. Constitutionally, governmental

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2. For Mr. Buono, as a practicing Catholic, the teachings of his church show the close link between the principles of the Golden Rule and his status as a litigant seeking to prevent the power of government from being used to impose his beliefs on others. Article 2 of *Dignitatis Humanae*, The Declaration on Religious Liberty of the Second Vatican Council (Vatican II), provides:

> This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs.
>
> This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. This is to become a civil right.

preferences violate the Establishment Clause; but religiously, as noted above, in a pluralistic society such preferences violate a core value of virtually every faith.

Even apart from the spiritual bruising empathetic Christians like Mr. Buono may suffer from being cast in the role of victimizer, there is yet another injury they suffer. For those who know how often over the past 1700 years the marriage of Church and State has corrupted both, the concern that Christianity might be corrupted by becoming government's favored religion is clearly a *religious* concern. And if one shares Roger Williams' and the Founding Fathers' concerns over the "purity" of religion that led ultimately to the Establishment Clause and the separation of the realms of religion and government it was intended to achieve, such concern over the purity of one's *own* religion is surely a religious concern.

The plain fact is that adherents of all western religions – Protestants of all denominations, Jews and Catholics – have suffered unspeakable injury as a result of religious establishments; at bottom, that is why the Founding Fathers agreed to disestablish religion by enshrining first and foremost in our Bill of Rights the First Amendment's Establishment and Religious Freedom clauses.

c) *Valley Forge Christian College v. Americans United* does Not Support Appellants' Claim that Mr. Buono Lacks Standing.

Appellants argue that "mere views about the appropriate scope of the Establishment Clause, however firmly held, do not confer standing" (Br. 14-15), citing as authority *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). They insist that Mr. Buono's objection to the Latin Cross on public land "arises solely from his commitment to certain constitutional views." Br. 16. But as argued above, that simply is not so. The fact that Mr. Buono is offended that a religious symbol he deeply believes in is being used by his government to make others feel like outsiders in their own land is not a "mere view about the appropriate scope of the Establishment Clause."[3]

Moreover, in *Valley Forge* the Court stated:

> We simply cannot see that respondents have alleged an *injury of any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of

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3. Mr. Buono was joined as a plaintiff in this case by the late Allen Schwartz, a Jewish War veteran who regularly traveled past the cross at issue here and was personally offended by its presence on federal land because it was "governmental favoritism of one religion that he does not share, thereby making him feel like an outsider." Amended Cplt. ¶¶ 6-8. In pursuing this action, Mr. Buono was thus keenly aware that a symbol of his faith was being used in a manner deeply offensive to someone else's faith.

> property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsman of the general welfare.

Id. at 486-87 (emphasis in original).

That is clearly not the situation here. Mr. Buono has a long time attachment to the area in question, was not roaming around looking for constitutional violations, was exposed to the Cross as part of his normal routine, and has altered his behavior as a result.

2. Appellants' Argument that Taxpayer Standing Cannot be an Alternative Basis for Standing in This Case is Based on Erroneous Facts and a Misleading Analysis.

Appellants, in note 1 of their Brief (Br. 17), after noting that taxpayer standing was not pleaded, argue that taxpayer standing cannot be an alternative basis for standing in this case because the congressional enactment Buono challenges does not rest on the taxing and spending clause as required in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). That is not so. While Appellants correctly state that the land

transfer was "an evident exercise of Congress's power under the Property Clause, Art. IV, sec. 3, cl. 2 of the Constitution," (Br. 17, n.1), that was not so regarding a critical provision of that legislation. The 2004 Act incorporated by reference the 2002 legislative authorization to spend up to $10,000 for the acquisition and installation of a replica Cross and a replica plaque, an authorization that was necessarily enacted pursuant to Art. III, sec. 8's taxing and spending provisions. The 2004 Act required the Interior Secretary to have the "continuing responsibility" set forth in the incorporated earlier provision.

3. The Principles of Separation of Powers, Checks and Balances, and Judicial Review, Compel the Conclusion that Mr. Buono has Standing.

Respectfully, were this Court to conclude that Mr. Buono lacks standing, it will have created its own "donut hole" in one of the most fundamental principles in American jurisprudence, viz., Judicial Review. As Chief Justice John Marshall opined in *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 178 (1803), if the judiciary stayed its hand in deference to the legislature, it would give that branch of our carefully structured government "a practical and real omnipotence." James Madison himself recognized that danger much earlier, in the concluding paragraph of his *Memorial and Remonstrance*: "Either . . . we must say that the will of the Legislature is the only measure of their authority, and that in the plenitude of this authority they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." *Quoted in*

Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 71 (1947) (Appendix).

We cite here the views of the majority Justices in *Flast v. Cohen*, 392 U.S. 83 (1968) (not overruled but limited in *Hein v. Freedom From Religion Foundation, supra*, to cases involving Congressional expenditures), not in order to support taxpayer standing but to demonstrate how almost unanimous that Court was in its support of Madison's and Marshall's views regarding judicial review, and to focus on how essential it is to find some path to the door of Judicial Review in Establishment Clause cases in order for both principles to have the meaning our Founding Fathers intended them to have.

Although the lone dissenter in *Flast*, Justice Harlan, would have allowed judicial review only "if Congress ha(d) appropriately authorized such suits," *id.* at 131, the remaining Justices, in four separate opinions, concluded that standing principles must be applied in a manner that does not subvert the protection promised by the Establishment Clause. For the Court, Chief Justice Warren concluded that whenever there are specific constitutional limitations on the taxing and spending power, such as in the Establishment Clause, "a taxpayer will have a clear stake . . . in assuring that they are not breached by the Congress." *Id.* at 105. Concurring, both Justices Douglas and Fortas stated the applicable standing principle in Establishment Clause cases more broadly. Justice Douglas warned that "where wrongs . . . are done by violations of specific guarantees, it is abdication for courts to close their doors," *id.* at 111, and Justice Fortas suggested that

perhaps "citizen" standing, even without reference to his taxpayer's status, ought be the basis for challenging governmental expenditures under the Establishment Clause because legislative acts which raise Establishment Clause issues "*should be subjected to judicial testing. This is not a question which we, if we are faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.*" *Id.* at 115-16 (emphasis added).

This *Amicus* is keenly aware of the long-enduring debate over whether there is an inherent conflict between democracy and judicial review and whether judicial review was part of the original understanding of the Founders or, as Alexander Bickel and others have claimed, a slight-of-hand, anti-majoritarian, creation of John Marshall. In 116 Yale Law Journal Pocket Part 215-227 (2007) there are three related scholarly articles bringing new life to that debate, which serve as a "powerful corrective" to what one of the authors called "mounting opposition to judicial review," opposition this *Amicus* views as deeply disturbing. All three, taken together, restate in modern guise Madison's view, just as did the eight Justices in *Flast.*

Professor Mary Sarah Bilder's new insight is that the origin of the judicial review concept was not John Marshall's creativity but English corporate law (already centuries old by the time corporate charters were granted to the early colonists) which required that corporate by-laws not be "repugnant" to the laws of England. Thus colonial legislation could not be repugnant to English law and on that theory hundreds of cases were appealed from colonial courts to the

English Privy Council. All that Chief Justice Marshall did in *Marbury*, Professor Bilder wrote, was recommit American constitutional law to an English practice that was already many centuries old and a colonial practice already two centuries old.

Professor Scott Gerber on the other hand located the deep historical roots of judicial review in eighteenth century political theory, most especially in John Adams' "Thoughts on Government" (1776). The judicial power, Adams wrote, must be "distinct from both the legislative and executive, and independent of both that it may be a check upon both, as both should be checks upon it," and he tied together the concepts of an "independent judiciary" and "judicial review" in order to strengthen the latter.

For his part, Professor William M. Treanor regarded Professor Bilder's analysis as a landmark contribution to the literature of judicial review because it buttresses a boundary protection understanding of the doctrine's origin. Privy Council review was, at its core, concerned with boundaries, ensuring that colonial governments did not overstep their bounds. In our early Republic judicial review performed a similar function – ensuring that legislatures did not legislate in ways undercutting the power of other entities.

"Checks and Balances," "Boundary Protection" that inheres in the "Separation of Powers" principle, "Judicial Review," the "Establishment Clause" – all are interconnected Constitutional principles and all are utterly essential for the proper functioning of a modern, pluralistic, democratic society. For the reasons set forth in the remainder of this Brief, a holding that there is no standing in this case will seriously weaken them all.

4. The Special Impact of Inflexible Standing Principles in Cases of Religious Symbols on Public Property.

Although this case involves national legislation, the real impact of a reversal of the Court of Appeals decision will be felt in small towns and cities that are already religiously fairly homogeneous. Notwithstanding the continuing geographic dispersion of Americans of many different faiths seeking better lives and new opportunities, there are still vast areas where there are few if any Catholics, and in 2500 out of America's 3140 counties there are no Jews.[4] Legislators in such towns and cities, knowing that no one will likely have standing to stop them (and knowing that in any event a legislative transfer and exchange of a few square yards of land would cure any violation), would soon find that permitting religious symbols on public lands and buildings is a winning political strategy, and one which could at the same time "sort out" potential new residents by discouraging those of dissimilar beliefs from ever becoming residents.[5]

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4. C. Grammich, "Many Faiths of Many Regions: Continuities and Changes Among Religious Adherents Across U.S. Counties" (Rand, Dec. 2004).

5. *See* Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 Supreme Court Review 135 (2006). Posit a sign at a town border that states, "Come to Corpus Christi, Population 98% Christian." Presumably that would encourage "sorting," i.e., encourage persons of a certain religion to reside there and others not to. Professor Samaha poses the question, if the reasonable observer endorsement test retires with Justice O'Connor's retirement, should an anti-sorting test take its place?

Traveling Americans have a right (indeed a constitutional right under the Privileges and Immunities clauses in Article IV and Amendment XIV) to travel to and through all parts of this nation without being made to feel unwelcome by local governments. Otherwise, as this Court long ago observed, "our Republic would constitute "little more than a league of states; . . . not . . . the Union which now exists." *Paul v. Virginia*, 8 Wall 168, 180 (1869). The privileges and immunities of citizenship include the right to resettle without being treated like an alien in their new community. (*See* discussion in this Court's 7-2 decision in *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999)). This right would be ephemeral for members of minority religious groups if local communities could use religious symbols to serve as signposts that members of certain religions are unwelcome. When moving to a community in which they may be part of a religious minority, no Americans should be, in the words of Justice Bradley in the *Slaughter-House Cases*, 16 Wall. 36, 112–113 (1873), "bound to cringe to any superior, or to pray for any act of grace as a condition of enjoying all the rights and privileges enjoyed by other citizens."

And that is the nub of the concerns of this *Amicus* – that what we might call "religiously-gated communities" – communities which let people know through the use of religious symbols on public ground that only persons of a certain religion will be comfortable there – in combination with inflexible standing principles in Establishment Clause cases, will undermine the relations between communities and between religions

in America; in other words change the very nature of the America we and most of the rest of the world revere. While municipal taxpayers would presumably have standing (*Bradfield v. Roberts*, 175 U.S. 291 (1899), *Daimler Chrysler Corp v. Cuno*, 547 U.S. 332 (2006)), "sorting" would prevent the "wrong" people from becoming municipal taxpayers.

This surely is an appropriate case in which to remember Justice O'Connor's cautionary question in *McCreary Cty. v. ACLU*, 545 U.S. 844, 882 (2005): "Why would we trade a system that has served us so well for one that has served others so poorly?"

B. Merits

1. The Exchange Legislation was Not an Attempt to Cure Congress's Previous Violations of the Establishment Clause.

Without a doubt Congress has the right – indeed the duty – to correct its own previous violations of the First Amendment's Establishment Clause. However, Appellants' assertions in Section III of their Brief (Br. 30-40) that that is all the Congress was doing when it enacted the transfer and exchange legislation is totally at odds with the record. All four Acts – the third and fourth no less than the first and second – violated the Establishment Clause (a) by seeking to prevent the removal of the Latin Cross and thereby (b) to prefer Christianity over all other religions, in violation of

unanimous decisions of this Court.[6] The third and fourth Acts also violated a permanent injunction of a federal court.

Far from attempting to cure its previous violations of the Establishment Clause, Congress's last two Acts were clear-cut, unambiguous, directions to Appellants to "permit" the continuing display of the Latin Cross in violation of an equally clear-cut, unambiguous, court order permanently enjoining exactly that: "Defendants...are hereby permanently *restrained from permitting* the display of the Latin Cross in the area of the Sunrise Rock in the Mojave National Preserve" (emphasis added).

To demonstrate how seriously Appellants departed from the record – and from applicable legal principles – in Section III A, we set forth below a few examples:

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6. Regarding the Latin Cross, even Justice Kennedy's dissent in *County of Allegheny v. ACLU*, 492 U.S. 473, 661 (1989) allowed as how the Establishment Clause forbids a permanent Latin Cross on City Hall, citing as authority two cases of such Crosses on public land, *ACLU of Georgia v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) and *Lowe v. City of Eugene*, 254 Ore. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042, *reh'g denied*, 398 U.S. 944 (1970). And regarding religious preferences, Justice Rehnquist in his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985), opined that "(i)t would seem . . . the Establishment Clause . . . has acquired a well-accepted meaning: it forbade the establishment of a national religion, and forbade preference among religious sects or denominations. . . ." A religious preference violates the "clearest command of the Establishment Clause. . . ." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Br. 30: "The injunction could not divest Congress of its 'authority to alter the prospective effect of previously entered injunctions.' *Miller v. French*, 530 U.S. 327, 344 (2000)."

> *However one views the 5-4 decision in* Miller v. French, *that decision in no way permits Congress to enact laws violating the Establishment Clause. Even if there had been no prior injunction, Congress could not pass a law requiring government to spend money to preserve the existing display of the Cross.*

Br. 32: "The court of appeals' analysis began from a mistaken premise: that the 2004 Act is part of the government's 'longstanding efforts to preserve and maintain the cross' in order 'to evade the injunction'."

> *There was no mistaken premise. The 2001 and 2002 Acts were long-standing Congressional efforts, prior to any Court injunction, to preserve and maintain the Cross in violation of the Establishment Clause. The third and fourth Acts were just as clearly repeated Congressional efforts to do the same and "to evade the injunction" as well.*

Br. 32: "Only after the district court enjoined the government from displaying the cross, did Congress pass the 2004 Act under review."

> *Apart from the fact that the third Act, too, was enacted after the injunction, the injunction enjoined the government not only from displaying the Cross, but also from "permitting" the display of the Latin Cross*

— a very significant phrase given the fact that in the 2004 Act under review that is indisputably what the Congress was doing.

Br. 33: "On its face the 2004 Act does nothing 'to preserve and maintain the cross.' It requires only that the VFW maintain the conveyed property as 'a' war memorial, not 'the' war memorial that had been designated in the 2002 Act. . . . The 2004 Act does not mention a cross, let alone require the VFW to display one."

The 2004 Act requires that "the conveyed property" (defined as "the Cross" and "adjoining Preserve property" in the 2002 Act (8137(a)) be maintained as a memorial by the VFW – thus requiring it to preserve and maintain the Cross – and also requires the Interior Secretary, notwithstanding the transfer, "to continue to carry out" the construction and installation of the Cross and Plaque required by the 2002 Act.

What is more disturbing is Appellants' confusing distinction between the words "a" and "the." The notion that the original plaque and Cross which Congress in 2002 explicitly required to be replicated for not more than $10,000 (8137(c)) was not "the" national memorial designated as such in the very same legislation (8137 (a)), and also was not "the" parcel of property beneath the Cross referred to in the 2004 legislation, constitutes a play on words not worthy of Appellants.

Br. 34: "(T)he Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987).

> *But the Court then went on to say, at 594-95, that "in scrutinizing legislative purpose one examines the specific sequence of events leading to [the law's] passage."*

Br. 34: "The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."

> *We agree, but neither will the Court "turn a blind eye to the context in which the policy arose,"* Santa Fe Ind. School Dist. v. Doe, *530 U.S. 290, 315 (2000), or ignore "the relationship between the statute and the two that preceded it. . . ."* Wallace v. Jaffree, *472 U.S. 38, 58 (1985).*

Br. 36: "The transfer of a war memorial...is a far cry from the conscious injection of religion in the public schools . . . ; teaching creationism . . . ; requiring bible study . . . ; or posting the Ten Commandments."

> *All the illustrations are Establishment Clause violations, as are the four successive conscious efforts by the Congress to prevent the removal of the Cross from frequently visited scenic public land (Dep. Tr. at 71-72). These four congressional enactments were even clearer religious preferences by government than the others.*

Br. 36: "The present case bears none of the indicia that Congress's secular justification is a sham."

> *To the contrary, all four Congressional Acts do. More than that, all four leap over the constitutional boundaries that separate the legislative from the judicial branch, and violate the checks and balances that preserve our fundamental liberties; and now Appellants, by raising the defense of standing, seek to shut the door on Judicial review as well.*

Br. 37, n.5: "While the 2002 Act requires the Park Service to acquire a replica cross, it requires the Secretary to install . . . only the replica plaque, not the replica cross: Sec. 8137(c)."

> *This is, to say the least, an "incorrect" reading of the statute which, in 8137(a) explicitly designated the "five-foot-tall white cross . . . as well as a limited amount of adjoining Preserve property" as a national monument; and in the same statute (8137(c)) authorized that up to $10,000 be spent to acquire a replica "of the original plaque and cross" . . . and "to install the plaque in a suitable location on the grounds of the memorial" (i.e. on the "limited amount of adjoining Preserve property"). The location of the replicated white Cross needed no legislative description for it was to replace "the original five-foot white cross." But the plaque had to be placed somewhere on the*

newly acquired "limited amount of adjoining Preserve property," and Congress gave the Secretary the discretion to choose "a suitable location on the grounds of the memorial" (8137(c)) just as, in 8137(a), it had given the Secretary the discretion to designate the "limited amount of adjoining Preserve property."

CONCLUSION

The principle that should govern the disposition of this case is the first clause in the Bill of Rights, "Congress shall make no law respecting an establishment of religion. . . ." Here Congress has made four such laws, indubitably respecting an establishment of religion, and in the process has also directed government officials to defy an order of the federal Court. This Court has the power and, we believe, the duty to void such egregiously unconstitutional laws.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Deposition of Frank Buono

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. EDCV 01-216-RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

Gale Norton, Secretary of the Interior, in her official capacity; John J. Reynolds, Regional Director, Pacific West Region of the Department of Interior, in his official capacity; Mary Martin, Superintendent of the Mojave National Preserve, in her official capacity, Defendants

Deposition of Frank Buono
Taken in [*sic*] Behalf of the Defendants
December 27, 2001

* * * * *

[12]

Q Let me ask your understanding of what it is that the complaint, and now the amended complaint, are designed to do. Why did you file this lawsuit?

A The complaint alleges a violation of the establishment clause of the First Amendment of the Constitution.

Q And what is that violation?

A The existence of a permanent and unattended religious symbol on federal land.

Q And am I correct in assuming that that religious symbol is a cross located at Sunrise Rock?

A That is correct.

* * * * *

[69]

Q You testified a moment ago, I believe, that you were curious when you first saw the cross. Did you find it objectionable?

A The cross per se, no.

Q Did you find something else about it objectionable?

A I've had a long interest – I've been a member of the American Civil Liberties Union for several years. I've had a long interest in separation of church and state issues. In particular, in the national parks where I spent

my whole working career. And I've been more than curious about some of the breaches that I perceived.

* * * * *

[71]

Q On those occasions when you stopped and got out of your car, looked at the cross outcropping, what else would you observe? What else could you see from within your line of vision?

A The area is one of the most scenic in the Preserve. It has a huge forest of dense growth of Joshua trees directly across the road, as well as this outcrop of granite rocks, which are uncharacteristic for the Preserve. Most of those rocks appear to me to be volcanic.

* * * * *

[72]

Q Are there any buildings visible?

A No.

Q Are there any telephone poles visible?

A No.

Q Are there any power lines visible?

A From there, I – no, I don't think so.

Q So basically, as you look out from this area, you see a natural environment subject to trails that you mentioned?

A And some – yeah. And vehicle. There are some vehicle tracks that go behind the outcrop and go off towards the Mescal Range off the east.

* * * * *

[73]

Q Were you traveling there specifically to observe the cross?

A We were traveling throughout Mojave National Preserve to observe areas of concern throughout the Preserve.

Q Do you define the cross as an area of concern?

A For me, yes. For them it was not a particular area of concern.

Q Them refers to?

A National Park Conservation Association. Their issues are environmental issues. First Amendment is not their valuing.

* * * * *

[81]

Q What if the plaque – what is it about this cross that you find objectionable?

A The cross is a clear recognizable religious symbol that occupies federal land.

Q And what religion does it recognize?

A The Christian religion.

Q Any particular part of the Christian religion?

A I believe the cross is universally recognized by all Christians, whether they are Protestant, Orthodox, or Catholic.

Q And do you know why it is called a Latin – do you know if this is called a Latin cross?

A I guess so. I'm not sure. I've heard of the Celtic cross and other crosses, but it's a cross.

Q Would it matter from your point of view what kind of cross it was?

A If it were a Greek Orthodox or Celtic cross, no, it wouldn't matter to me.

Q Any kind of a cross would be objectionable?

A A cross, yeah.

Q As a symbol of —

A Of Christianity.

Q — Christianity.

* * * * *

[83]

Q If symbols or other religions were included, for example, let's say if Mr. Hoops had been granted permission to erect a Buddhist Stupa, S-T-U-P-A, I believe is the term he referred to, would you find that objectionable?

A Yes.

Q And that is because it would be on federal land, and a religious symbol?

A I would find it – I would find objectionable the establishment of that particular piece of federal park land as a place where one could erect any symbol that one wanted to. I would find that objectionable.

Q Okay. If the Park Service said, here is a plot of land, anyone from any religious practice, feel free to erect symbols to your religion, would you find that objectionable or is that simply the exclusion of religions other than Christianity that troubles you?

A By this cross I am troubled by the fact it represents one religion to the exclusion of all others.

Q So it's possible that we could have an

* * * * *

[84]

open public forum for all religions?

A That raises a separate question about whether it is appropriate to use federal park land, it's not a First Amendment issue, then, as an open public forum for the expression of all religious and all other points of view. Not just religious, but all other points of view, and free speech.

In other words, let's have a free speech zealot there, which anyone can put up any plaque, and billboard, any sign. This questions, then, a propriety of comportment with the National Park Service preservation mission.

* * * * *

Q Do you believe that the Bureau of Land Management had an obligation to remove the cross while it managed the land?

A Yes, I do.

Q So it really – the park service's mission is really irrelevant. It is simply a question of having a cross on federal land?

* * * * *

[85]

A They are two different questions. The park service's mission issue arose in the context of an open public forum. Now, we are talking about just the cross, so in this case, BLM's tolerance of effectively an unauthorized trespass with a symbol placed on federal lands, yes, it's objectionable. And BLM should have removed it.

* * * * *

Q If someone came in during the night and

* * * * *

[86]

spray painted a Jewish star on the rock outcropping, would you find that objectionable?

A Yes.

Q Would the Park Service be required to use some means of getting rid of that spray-painted cross?

A Yes.

Q And the same would be true for Muslim, crescent, or other religious symbol?

A Yes.

* * * * *

[89]

Q Is the Park Service required to maintain an encyclopedic knowledge, so they can know which symbols have to be removed, and which can be maintained?

A One does not need an encyclopedic knowledge to recognize the cross as a religious symbol for about one and a half billion people.

* * * * *

[91]

Q I believe you testified a moment ago, and correct me if I am wrong, that it was permissible for the Park Service to sell or offer for sale on Park Service land, food that carries an indication of rabbinic approval of kosher – satisfying kosher laws in the Jewish faith. That was acceptable, you don't

* * * * *

[92]

object to that?

A You used the example of the yogurt container –

Q Yes.

A — that contains a small k on it.

Q Right.

A No. No objection to that, whatsoever.

Q By authorizing the sale of that product, is the Park Service excluding or discriminating against other religions that may have their own dietary laws?

A No. What the Park Service would be doing, or any other agency, is engaging in a reasonable accommodation of free exercise rights, so that consumers who come to visit the park and purchase that yogurt would be able to see that the product they are buying meets their specific dietary laws.

* * * * *

[93]

Q Is the Park Service or some other federal agency required to remove all of those crosses?

A No.

Q Why not?

A Because the cemetery represents the actual burial ground of a once living person. A person who presumably had an affiliation with the religion represented by the symbol that is placed on their tombstone. For Christians it would be a cross. If you go to Arlington you will find tombstones with the Star of David, as well.

So there is a great distinction between a tombstone and a religious symbol representing the, essentially, free expression of the person who is now deceased.

Q What about a memorial that commemorated veterans, but did not actually mark the physical burial place of soldiers?

* * * * *

[94]

A If the memorial consisted solely of a cross, it would be exclusionary, as well as being an establishment clause violation.

Q Well, let's say it had a cross of the Star of David.

A I would find that less objectionable, but objectionable still, because not all veterans are either Christians or Jews. We also have veterans who are

Atheists. Perhaps ten percent of the population of the United States are Atheists.

* * * * *

[104]

Q And what did you say to Mr. Burk?

A Mr. Burk is the president of the Citizens from Mojave National Park. And I was recounting to him several issues that were ongoing in the preserve. And I said, besides all this, I am pursuing something which is quite personal to me, which is not an environmental issue and it is the cross at Sunrise Rock.

Q When did you speak to Mr. Burk?

A Probably sometime in 2000.

Q Did he have any reaction?

A Yes. He was not supportive of my personal concern.

* * * * *

[118]

Q On page 2, again that's paragraph No. 5.

It says, Although Mr. Buono has no objection to Christian symbols on private property, he is deeply offended by the display of a Latin cross

* * * * *

[119]

on government owned property; is that a correct statement?

A That's correct.

Q Are you deeply offended by the presence of this cross?

A Yes.

Q Has that been the case from your initial visit?

A Well, from my initial visit I wasn't sure that it was on government owned land. I wasn't sure it was on federal lands, but since I became aware that it was federal lands, yes.

* * * * *

[120]

Q Once you knew it was federal land, at that point —

A Uh-huh.

Q — you became deeply offended?

A Yes.

* * * * *

[146]

Q Do you consider yourself a religious man, Mr. Buono?

A Yes.

Q What – do you identify with any particular organized religion?

A Yeah. Uh-huh.

Q What religion?

A Roman Catholic.

Q Do you go to services at a church?

A Yes, I do.

Q And this church has crosses displayed, one can assume? Is that a fair statement?

A Yes.

Q Have you ever had any training or – or — in – in religion or ever been – considered a career in the priesthood?

A No. Training in religion – I mean academically, yes.

Q As a – a Christian and a Roman Catholic, I take it you don't find the cross, itself, offensive?

A Obviously not.

* * * * *

[147]

Q And you don't find a cross standing out in open space by itself offensive?

A I do not.

Q The only thing that's offensive about this cross is that you've discovered that it's located on federal land?

A Correct.

Q But apart from Mr. Hoops, you know of no — no one else has ever approached you and told you that they found the cross offensive, have they?

A No one has ever initiated or sought me out to tell me that.

Q But you have – I think you said you have had some conversations with other people in which you describe your views of the cross –

A Uh-huh.

Q — and some of those individuals, I believe, you said —

A Agreed.

* * * * *

[160]

Q How – tell me how the government is promoting religion by allowing the cross to remain.

A By an act of omission and tolerating the continued existence and use of federal lands in an unauthorized fashion for the erection of a permanent, unattended, religious display.

Q And how does that promote religion? Does the government —

A It's self-evident.

Q Is the government inviting anyone to engage in religious services?

* * * * *

[161]

A The government doesn't have to compel people to worship at the foot of the cross in order to promote religion by allowing a cross to be placed and maintained on federal land by acquiescence.

Q So the government must remove the cross, in your view?

A Correct.

Q And anything short of that would be a constitutional violation, in your opinion?

A Correct.

Q And the same would be true for any other kind of religious symbol on any federal land?

A There are certain exceptions. We've talked about them, for example, grave stones for dead people.

Q But other than grave stones?

A As a general rule, yes.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE CLERK

No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

FRANK BUONO,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Jewish War Veterans of the United States of America, Inc. (JWV), organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924, and chartered by an act of Congress in 1983, *see* 36 U.S.C. § 110103, JWV's objectives include "preserv[ing] the memories and records of patriotic service performed by the men and women of the Jewish faith and honor[ing] their memory," *id.* § 110103(12), and "shield[ing] from neglect the graves of our heroic dead," *id.* § 110103(13).

JWV has long taken an interest in the appropriate character of federal war memorials. *See, e.g., Jewish War Veterans of United States* v. *United States*, 695 F. Supp. 3 (D.D.C. 1988) (invalidating display of cross on Marine Corps base under Establishment Clause). JWV is currently a plaintiff challenging the Government's display of a 43-foot-high Latin cross on Mt. Soledad in San Diego, California. *See Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal filed sub nom. Jewish War Veterans of United States* v. *Gates*, No. 08-56415 (9th Cir. filed Aug. 21, 2008). Allen Schwartz, respondent's co-plaintiff who died during the course of this litigation, was Quartermaster of JWV Post 152. Pet. App. 124a.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

INTRODUCTION

The United States Government has designated just one national memorial to honor American veterans of World War I: a Latin cross on federal land in the Mojave National Preserve. By choosing Christianity's chief symbol as the nationally endorsed means of paying tribute to World War I veterans, the Government sends the unmistakable message that it deems less worthy of honor the sacrifices of non-Christian veterans, including the 250,000 Jewish service members who answered America's call to duty in World War I. In a ruling not before the Court, the court of appeals held that the display of the Cross violates the Establishment Clause.[2] The Government's superficial attempt to cure its Establishment Clause violation is insufficient to remove its imprimatur from the message that non-Christian veterans are outsiders undeserving of their nation's praise.

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[2] The district court held (Pet. App. 139a), and the court of appeals affirmed (*Id.* at 108a), that the Government's display violates the Constitution. The petition "does not present the question whether the display of a cross in connection with the war memorial at Sunrise Rock violates the Establishment Clause, but rather whether Congress's efforts to resolve any Establishment Clause problem by transferring the land to private hands may be given effect." Pet. 20 n.8. Nor could the petition present that question, as the Government is barred from relitigating that issue in this enforcement proceeding. *See* Resp. Br. 9-10. The constitutional issue not here presented is presented on not dissimilar facts in *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal filed sub nom. Jewish War Veterans of United States* v. *Gates*, No. 08-56415 (9th Cir. filed Aug. 21, 2008).

SUMMARY OF ARGUMENT

Congress's proposed partial transfer of the land underneath the Latin cross on Sunrise Rock in the Mojave National Preserve does not cure the Government's Establishment Clause violation. The Latin cross is a powerful Christian symbol and is not a symbol of any other religion. Even when labeled a "war memorial," the cross retains its Christian significance because its meaning—either of self-sacrifice or death—is derived from and reinforces core Christian doctrine. Any government effort to promote display of the preeminent symbol of Christianity, even when labeled a "war memorial," bespeaks a religious purpose. In the 2004 Act, the Government acted with a plainly religious purpose by attempting to preserve the display of the Sunrise Rock Cross. That purpose condemns the proposed transfer as inadequate to remedy the Establishment Clause violation.

Under the 2004 Act, the Government's continued control over the Cross and surrounding property would sustain its endorsement of religion. Rather than divesting itself of the display, Congress insisted on a reversionary interest and easement, thus retaining partial ownership. Moreover, by transferring an acre surrounded on all sides by a vast national preserve and labeling that property a national memorial, the Government would retain strong regulatory authority over the land on which the Cross sits. Finally, through the reversionary clause and a criminal prohibition on injuring veterans' memorials, the Government would all but guarantee preservation of the status quo: the symbol of Christianity standing in the middle of the Mojave National Preserve. This limited transfer does not adequately disentangle the Government from the Cross's religious message.

Finally, the transfer does not undo Congress's 2002 designation of the Sunrise Rock Cross as a national World War I memorial. By labeling the Cross as our sole national memorial to veterans of World War I, the Government ignores and denigrates the service of non-Christian veterans of that war. The national-memorial designation perpetuates the Government's endorsement of religion by giving the Government enhanced regulatory powers over the display, conveying the Government's ongoing support for the Cross's message. More importantly, the national-memorial designation is the Government's single most effective means of associating itself with a memorial's message. By selecting the preeminent symbol of Christianity to commemorate World War I veterans, the Government has implied that only Christian veterans are worthy to be honored. The Government's formalistic attempt to cure its Establishment Clause violation while all but guaranteeing the Cross's continued display is inadequate given the Government's ongoing proclamation that the Christian Cross represents all veterans of the First World War.

ARGUMENT

I. THE GOVERNMENT'S EFFORT TO PERPETUATE THE CROSS DISPLAY LACKS A SECULAR PURPOSE

The United States Government displays a Latin cross on Sunrise Rock in the Mojave National Preserve (the Sunrise Rock Cross or Cross). Pet. App. 55a. The Government has designated that Cross as our only national memorial honoring World War I veterans. *See* Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. In response to an injunction barring its display of the Cross, the Government sought to perpetuate the Cross's display by transferring the Cross and the land

underneath it to a Veterans of Foreign Wars (VFW) post. *See* Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100, *codified at* 16 U.S.C. § 410aaa-56 (note). The 2004 Act defining the terms of the land transfer fails to cure the Establishment Clause violation because it all but guarantees the continuing display of the Cross, a Christian symbol that retains its religious meaning even when labeled a war memorial.

A. The Latin Cross Is a Profoundly Religious Christian Symbol

The Latin cross is the preeminent symbol of Christianity. No "symbol [is] more closely associated with a religion than the cross is with Christianity."[3] The cross "represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Ellis* v. *City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993). To billions of Christians throughout the world, "the message of the cross" is no less than "the power of God." I Corinthians 1:18 (NIV).

The centrality of the cross to Christian belief is reinforced by its use in Christian worship (but in the rites of no other religion). The symbol "greets us in the form of the Cross from the tower of every church, from every Christian grave-stone and in the thousands of forms in which the Cross finds employment in daily life."[4] Use of the cross in church architecture began

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[3] Keister, *Stories In Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004).

[4] Warfield, *The Essence of Christianity and the Cross of Christ*, 7 Harv. Theol. Rev. 538, 592 (1914).

with Catholicism, and "[c]rosses can be now found on nearly every Protestant church in America, from the tops of spires down to decorative cornerstones."[5] Inside those churches, "[p]lain and decorated crosses hang above Communion tables, glow in stained-glass windows, trim ministers' vestments, adorn Communion vessels, and mark gravesites in surrounding yards."[6] The cross is used during Christian worship in liturgical processions or through the "sign of the cross" made by clergy to bless certain people and objects.[7] Outside church, many Christians rely on the cross as a symbol of inspiration, displaying the cross in their homes or on chains around their necks.[8]

The profound religious significance of the cross is so apparent that in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), all nine Justices of this Court joined opinions using the Latin cross as the prototypical example of an unconstitutional religious display.[9] This Court had noted on an earlier occasion that the "church

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[5] Smith, *Gothic Arches, Latin Crosses: Anti-Catholicism and American Church Designs in the Nineteenth Century* 54 (2006).

[6] *Id.*

[7] Quill, *Liturgical Worship*, in *Perspectives on Christian Worship: Five Views* 18, 35-36 & n.28 (Pinson ed., 2009).

[8] *Id.* at 36.

[9] *See Allegheny*, 492 U.S. at 599 (plurality opinion) (adornments could not "negate the endorsement of Christianity conveyed by the cross"); *id.* at 629 (O'Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.) ("[Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall").

speaks through the Cross," *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943), and many other courts have reached the unsurprising conclusion that the cross is a sacred Christian symbol with great religious significance.[10]

B. The Use of a Latin Cross as a War Memorial Does Not Sap the Cross of Its Christian Meaning, But Preserves and Enhances Its Religious Significance

Contrary to the Government and some amici, labeling the cross a war memorial does not deprive it of religious meaning. If the cross does symbolize "the sacrifices of fallen service members" (Pet. Br. 39), that meaning is inseparable from Christian doctrine. If honoring sacrifice is a meaning of the cross, it is because for Christians (but only for Christians), the cross symbolizes Christ's sacrifice for humankind's sins. If the cross signifies death, it is because for Christians (but only for Christians), the cross evokes Christ's death, resurrection, and promise of everlasting life. For non-Christians, the cross carries no such meanings.

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[10] *See, e.g.*, *Gonzales* v. *North Twp.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Harris* v. *City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777, 781 n.3 (10th Cir. 1985); *ACLU of Ga.* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983); *ACLU* v. *City of Stow*, 29 F. Supp. 2d 845, 852 (N.D. Ohio 1998); *Mendelson* v. *City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989); *ACLU of Miss.* v. *Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987); *Libin* v. *Town of Greenwich*, 625 F. Supp. 393, 398 (D. Conn. 1985); *Greater Houston Chapter of ACLU* v. *Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984).

The Government makes no effort to explain how the cross—the preeminent symbol of Christianity—can honor America's veterans, perhaps because any articulation would reveal its Christian roots. Some amici, including Thomas More Law Center, contend that the cross is a "universal symbol of self-sacrifice," such that "in the context of a war veterans' memorial, the cross is a symbol of the ultimate sacrifice made for one's country." Br. of Amici Curiae Thomas More Law Center et al. (TMLC Br.) 16; *see also* Br. of Amicus Curiae American Legion Department of California (Legion Br.) 13 ("the cross is a uniquely transcendent symbol representing the decision to lay down one's life for the good of others"). But this theory honors war dead by comparing them to Jesus: Just as Jesus shed his blood for the sinful world, America's war dead shed blood for the nation. This analogy works only for those who embrace the doctrine of atonement through Christ's crucifixion, and the comparison intended to honor veterans' sacrifices simultaneously reinforces Christian beliefs about the nobility of Jesus's crucifixion through association with brave Americans. Such a message violates the Establishment Clause command that Government "may not promote or affiliate itself with any religious doctrine." *Allegheny*, 492 U.S. at 590.

Other amici claim that a cross labeled a war memorial honors veterans by sending a secular message of death or burial. *See, e.g.*, Br. of Amici Curiae Utah Highway Patrol Ass'n et al. (UHPA Br.) 16 (cross is "an instantly recognizable symbol of death and sacrifice, ... traceable to its prevalent use as a grave marker"); Legion Br. 15 ("Crosses are also commonly used to symbolize death."). But this theory ignores that crosses used in memorials and cemeteries do not signify death in the abstract but instead declare the de-

ceased's Christian faith. In "a custom ... almost as ancient as the Christian religion itself," Christians mark gravesites with the cross "to signify ... the resting place of a Christian" in a tradition that "remains the standard form of ritual Christian grave-practice in many parts of the world."[11]

Non-Christians do not mark gravesites with the cross, either generally or in the military setting. For instance, the U.S. Department of Veterans Affairs (VA) provides rectangular memorial headstones for the graves of deceased veterans.[12] Recognizing that the cross cannot adequately represent all veterans, the VA permits a veteran's family to honor the veteran's faith by selecting one of 39 "emblems of belief" for inclusion on the headstone.[13] Among these emblems are fifteen different crosses, including the unadorned Latin cross that the VA labels the "Christian Cross." The VA offers many other emblems to mark the graves of veter-

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[11] Sullivan, *The Impossibility of Religious Freedom* 197 (2005) (quoting report of Dr. John McGuckin in *Warner* v. *City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999)).

[12] *See* U.S. Dep't of Veterans Affairs, *Eligibility for a Headstone or Marker*, at http://www.cem.va.gov/hm/hmelig.asp (last updated June 8, 2009).

[13] *See* U.S. Dep't of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, at http://www.cem.va.gov/hm/hmemb.asp (last updated Mar. 12, 2009). Crosses chosen by veterans and their families to mark veterans' graves do not run afoul of the Establishment Clause because "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

ans of the Jewish, Muslim, Hindu, Sikh, Buddhist, and other faiths. These options reflect the VA's conclusion that the cross is not a universal grave marker because is it not a secular symbol of death or sacrifice, but instead conveys the message that the veteran resting beneath was Christian.

The understanding that the Christian cross does not represent non-Christian veterans is also held by the American Battle Monuments Commission, which maintains overseas military cemeteries. During World War I, the War Department determined that the graves of Jewish soldiers who had died in battle would be marked with the Star of David. *See Jewish Soldiers' Graves To Be Marked by a Double Triangle Instead of a Cross*, N.Y. Times, July 25, 1918, at 22. Major General Crosby explained in a 1930 address that "[m]any of our heroic dead lie in Flanders Field, Suresnes, Belleau Wood, and elsewhere. The star of David is mingled with the cross in beautiful and everlasting marble. As they lived together, fought together, so they lie buried, side by side." 72 Cong. Rec. 11064 (June 17, 1930). To this day, the graves of Jewish soldiers are marked with the Star of David, not a Christian cross, in American military cemeteries overseas.[14]

Nor are crosses so entrenched or ubiquitous as war memorials that they can avoid "convey[ing] a message of endorsement of particular religious beliefs" "despite their religious roots." *Allegheny*, 492 U.S. at 630-631 (O'Connor, J., concurring in part and concurring in the judgment)). Contrary to the claims by amici supporting

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[14] *See American Battle Monuments: A Guide to Military Cemeteries and Monuments Maintained by the American Battle Monuments Commission* 10 (Elizabeth Nishiura ed., 1989).

the Government that the cross is "commonly" used in war memorials (Br. for Amici Curiae Veterans of Foreign Wars et al. (VFW Br.) 10; *see also* Legion Br. 14; UHPA Br. 19), the Latin cross—because it is so religiously exclusive—has rarely been used to honor veterans collectively.

To prove the supposed ubiquity of the Latin cross as war memorial, amici led by the VFW point (Br. 11) to the use of the Cross of Sacrifice, a cross adorned with a bronze sword, in war cemeteries across the former British Empire. But the British selection of that monument confirms its religious meaning: the Commonwealth War Graves Commission chose the cross in "recognition of the fact that we are a Christian Empire" and to represent "the great majority [for whom] the Cross is the symbol of their faith."[15] Its design, approved by the Archbishop of Canterbury, *see* Blomfield, *Memoirs of an Architect* 179 (1932), evoked Britain's use of Christian ideas in wartime propaganda, most famously in a lithograph titled "The Great Sacrifice" that connected soldiers' deaths to the crucified Christ, *see* King, *Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance* 129-130 (1998). Britain—a nation with an established church headed by its monarch as Defender of the Faith—chose the cross as war memorial precisely because it was religious, illustrating why it is such an inappropriate symbol for a country that is not a "Christian Empire."

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[15] Sir Frederick Kenyon, *War Graves: How the Cemeteries Abroad Will Be Designed* (1918), *available at* http://yourarchives.nationalarchives.gov.uk/index.php?title=The_Kenyon_Report._Part_1.

Amici further assert that the Latin cross is "typical" in war memorials (VFW Br. 10) and that cross memorials appear in "countless" places across the United States (*id.* at 13). In truth, the cross is so infrequently used as a war memorial that amici can only muster ten examples from the tens of thousands of war memorials across the country.[16] And even among those ten outliers, rarely are unadorned crosses used to represent all veterans. The Celtic cross—one of 1300 monuments at Gettysburg—represents a brigade of Irish immigrants; the French Cross in New York represents French sailors who died in American waters; and the Canadian Cross of Sacrifice—a gift from the Canadian government—represents Americans who fought for the British Empire in the Canadian Armed Forces during World War I. And unlike the Sunrise Rock Cross, these other crosses are typically adorned with or surrounded by symbols of war and nationhood. The claim that the Latin cross is frequently used to honor American veterans lacks support.

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[16] *See* VFW Br. 12-13 (citing Argonne Cross and Canadian Cross of Sacrifice in Arlington National Cemetery; French Cross Monument in Cypress Hill National Cemetery; Unknown Soldiers Monument in Prescott National Cemetery in Arizona; Memorial Peace Cross in Bladensburg, Maryland; Wall of Honor at Pennsylvania Military Museum); States Br. 14-15 (citing memorial at West Perry High School in Pennsylvania and Mt. Soledad Cross in San Diego, California); TMLC Br. 16 (citing Irish Brigade Memorial in Gettysburg National Military Park and memorial in Taos Plaza).

C. The 2004 Act—Designed To Perpetuate the Display of a Christian Symbol—Has an Unmistakable Religious Purpose That Makes It Wholly Inadequate to Remedy an Establishment Clause Violation

1. No Purpose To Preserve a "War Memorial" Cross Can Be Deemed Secular

The Establishment Clause forbids the Government from "act[ing] with the ostensible and predominant purpose of advancing religion." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005). As this Court has held, a government can act with respect to religion in such an overt way that "the government action itself besp[eaks] the purpose." *Id.* at 862. In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), for example, "the object of required Bible study in public schools was patently religious," *McCreary*, 545 U.S. at 862. And in *Stone* v. *Graham*, 449 U.S. 39 (1980), this Court held that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *Id.* at 41.

Because the government's actions in those cases touched on inherently religious matters with such obvious religious ramifications, the Court needed no extra evidence to identify a religious purpose. *See Abington*, 374 U.S. at 223; *Stone*, 449 U.S. at 41-42; *see also McCreary*, 545 U.S. at 869 ("When the government initiates an effort to place [an unmistakably religious statement] alone in public view, a religious object is unmistakable."). Government professions of secular purpose were implausible given the "pervading religious character" of the challenged conduct. *Abington*, 374 U.S. at 224.

Government action rarely bespeaks a religious purpose more plainly than when the government promotes the display of a symbol as profoundly religious as the Latin cross. In *Abington*, this Court so easily found religious purpose in part because "the place of the Bible as an instrument of religion cannot be gainsaid." 374 U.S. at 224. Likewise, when the government attempts to perpetuate the display of the Latin cross, indisputably an instrument of religion, the attempt is patently religious regardless of the absence of statutory text or legislative history to confirm that religious objective.

The religious purpose of government efforts to perpetuate the display of the Latin cross is obvious even when the cross is labeled a "war memorial." The asserted secular purpose of such displays—honoring veterans—is empty because not all veterans are Christians. *See Abington*, 374 U.S. at 224 (plainly religious character of Bible not "consistent with the contention that the Bible is here used ... as an instrument for nonreligious moral inspiration"). Approximately one million Jews served in America's armed services during the twentieth century. It defies logic to suggest that the Government would aim to remember Jewish (or other non-Christian) veterans by displaying the symbol of Christianity. There is no rational connection between the avowed purpose of honoring veterans of all religions and the act of displaying the symbol of only one religion.

2. The 2004 Act Does Not Cure the Government's Establishment Clause Violation

As the Constitution forbids Congress from acting with a religious purpose, the Government plainly cannot remedy an Establishment Clause violation with a

similarly motivated law. The 2004 Act outlining the transfer of land to the VFW has a religious purpose because its central object is to ensure that the Sunrise Rock Cross remains standing. According to the Government (Br. 36), the purpose of the 2004 Act is to "preserv[e] a national memorial to fallen service members." But this asserted purpose—as just explained—makes no sense because the statute merely preserves a Latin cross, which cannot serve as a secular memorial to service members. In all but the rarest of circumstances, not present here, government action to encourage the display of Christianity's symbol must be deemed to have a religious purpose.

While a government's avowed secular purpose is entitled to some deference, it is "the duty of the courts to distinguish a sham secular purpose from a sincere one," *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000) (internal quotations omitted and alterations in original incorporated); this Court "ha[s] not made the purpose test a pushover for any secular claim," *McCreary*, 545 U.S. at 864. The purpose test would have "no real bite" if courts simply rolled over whenever lawmakers offered some barely plausible explanation, "given the ease of finding some secular purpose for almost any government action." *Id.* at 865 n.13. Where, as here, there is no logical connection between the asserted purpose (honoring veterans of all religions) and the goal (displaying the symbol of one religion), the asserted purpose must be rejected.

Beyond pleading for deference, the Government seeks to blindfold the reasonable observer, whose knowledge and perception are the Establishment Clause touchstones for determining whether a government's action endorses religion. *See, e.g.*, *McCreary*, 545 U.S. at 866; *Santa Fe*, 530 U.S. at 308. The Gov-

ernment contends that Congress's 2001 enactment, which prohibited the use of federal funds to remove the Cross (Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, App. D, § 133, 114 Stat. 2763, 2763A-230), and the 2002 Act are irrelevant to understanding the 2004 Act because "[t]hose two statutes ... predate the district court's permanent injunction preventing display of the cross." Pet. Br. 32. This contention revives the argument squarely rejected in *McCreary*: "that purpose ... should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject." 545 U.S. at 866. The artificial line drawn by the Government unrealistically suggests that Congress (1) only learned of the Cross display's constitutional infirmity once the district court entered the injunction; or (2) suddenly abandoned its theretofore unconstitutional efforts to preserve the Cross after the court entered the injunction.

Neither theory is plausible. The court of appeals rightly recognized that the 2001 and 2002 enactments were just "first step[s] in forestalling inevitable enforcement of a federal injunction" when Congress learned of the threatened (and subsequently filed) lawsuit. Pet. App. 83a. And the 2004 Act, rather than moving away from those earlier efforts to keep the Cross standing, embraces them; the 2004 Act explicitly references and reaffirms the 2002 effort to bolster the federal display of the Cross. *See* 2004 Act § 8121(a).

The Government's principal argument is a bizarre one: that the 2004 Act does not actually do what Congress intended it to do. The Government makes the contradictory claims that in 2004 Congress intended "the preservation of a longstanding memorial" (Br. 32) but that Congress "d[id] nothing 'to preserve and main-

tain the cross'" (Br. 33). The Cross display is surely "longstanding"; its "preservation" requires that it continue to stand, not be replaced by something new. Yet to save the 2004 Act, the Government adopts a fanciful interpretation that eviscerates Congress's goal of preserving the display of the Cross.

The 2004 Act conveys to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by [the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." 2004 Act § 8121(a). That conveyance is "subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." *Id.* § 8121(e). The Government contrasts the 2002 Act, which designates both the "five-foot-tall white cross" and "a limited amount of adjoining Preserve property" as a memorial, with the 2004 Act, which requires only that "the conveyed property" be maintained as a memorial. Br. 33. Under the Government's interpretation, because the "2004 Act does not mention a cross," the Cross is not part of "the conveyed property" that the legislation requires to be maintained as a memorial. *Id.*

This reading compels the absurd conclusion that the conveyance to the VFW includes only the land underneath the Cross while the Government retains ownership of the Cross itself. It further ignores the fact that the Cross, which has been bolted into the rock (Pet. App. 56a), is a fixture that is by definition part of the conveyed real property. *See* 35A Am. Jur. 2d *Fixtures* § 3 (2001) ("A fixture is owned by the owner of the land upon which the structure is permanently af-

fixed[.]"). The Government's odd interpretation would mean that Congress carried out its Government-proclaimed goal of "preserving a national memorial to fallen service members" (Pet. Br. 36) by writing a law that did nothing to preserve that memorial. Finally, the Government's construction would do nothing to remedy the Establishment Clause violation, since the continued display of the Cross would be correctly attributable to its owner, the United States.

II. THE GOVERNMENT EXERCISES ONGOING CONTROL OVER THE CROSS AND SURROUNDING LAND, FURTHER UNDERSCORING ITS UNCONSTITUTIONAL ENDORSEMENT OF CHRISTIANITY

At Sunrise Rock, the Government has attempted to outsource its religious display to a private owner, but has not relinquished its control over that display. The Government's continued control over the Cross at Sunrise Rock perpetuates its endorsement of religion and renders the selected remedy insufficient to cure the constitutional violation. This control is exerted in a variety of ways, including the threat of civil and criminal penalties if the Cross is removed.

A. The Government Maintains Control Over the Cross and Adjoining Land

The Government's ongoing and pervasive control over the land and Cross at Sunrise Rock perpetuates its endorsement of religion. *See Santa Fe*, 530 U.S. at 314. In at least four ways, the Government has ensured its control over the venue of the Sunrise Rock Cross:

- Congress mandated a reversionary interest that is triggered if the land is used in any way other than what the Government prescribes (and may

even require the continued display of the Cross, *see infra* Part II.B).

- The location of the transferred land entirely within a national preserve subjects it to heightened government regulation.
- The National Park Service (NPS) is responsible for the "supervision, management and control" of the national memorial at Sunrise Rock.
- Congress required a governmental easement for the purpose of installing a plaque.

These provisions perpetuate the Government's control and would cause the objective observer to perceive continued governmental endorsement of the Cross. *See Santa Fe*, 530 U.S. at 308.

1. The Government's Reversionary Interest Underscores, and Does Not Remedy, Its Endorsement

When the Government sought to transfer the Cross and land to the VFW, it denied the VFW one of the fundamental features of ownership: the right to use the property as desired. Instead, the Government obligated the VFW to continue a single, narrow use by preserving for the Government a reversionary interest that would be triggered if the land no longer is used as a war memorial. 2004 Act § 8121(e).

This type of interest has been held to constitute government control and state action. *See, e.g., Hampton* v. *City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962). In *Hampton*, after the City of Jacksonville, Florida was enjoined from operating two segregated golf courses, it sold the properties with a reversionary clause requiring the purchasers to use the properties "only 'for the pur-

pose of a golf course.'" *Id.* at 320-321. The Fifth Circuit "conclude[d] that the inclusion of the reversionary clause in these conveyances constituted the purchasers of the two golf courses state agents." *Id.* at 323. The Government's reversionary clause here is identical in form to that condemned in *Hampton*.[17] The reversionary clauses in both cases mandate the continued operation of the property in the very same way that, while under government control, was found constitutionally objectionable.

Similarly, in *Eaton* v. *Grubbs*, 329 F.2d 710 (4th Cir. 1964), a racially segregated private hospital was subject to a reversionary clause held by local government units requiring that the property "be used and maintained as a Hospital for the benefit of the County and City." *Id.* at 712. The Fourth Circuit adopted as "persuasive" *Hampton*'s conclusion that the existence

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[17] *Hampton* cannot be distinguished, as the Government suggests, on the ground that the golf-course sales were not "bona fide." Pet. Br. 44 n.8. To the contrary, the sale at issue in *Hampton* was cited by the Fifth Circuit as an example of a bona fide purchase. 304 F.2d at 322. In the passage to which the Government points, the court compared such a bona fide sale not to a sham sale, but to a *lease*, and concluded there was no relevant difference "between a long-term lease for a particular purpose with the right of cancellation of the lease if that purpose is not carried out on the one hand, and an absolute conveyance of property, subject, however, to the right of reversion if the property does not continue to be used for the purpose prescribed by the state in its deed of sale." *Id.* The Fifth Circuit's conclusion that a bona fide sale with a reversionary clause is conceptually identical to a long-term lease refutes the Government's argument that a reversionary interest alone cannot demonstrate government control. As a later court noted, "in *Hampton* the reverter clause was the only relationship the city retained with the property." *Eaton* v. *Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964).

of a reverter clause was "itself sufficient to constitute 'state action.'" *Id.* at 714 (citation omitted).[18]

As in *Hampton* and *Eaton*, by requiring that the VFW continue to use the transferred land as a memorial, the Government has effected ongoing control. There is now an "absolute obligation on the part of the [VFW] that [it] immediately, presently and always use the ... property for [memorial] purposes, and no other." *Hampton*, 304 F.2d at 322. Because the Government has so forcefully dictated how the property must be used, it continues to control such use.

2. The Government's Regulatory Authority Over Inholdings Underscores, and Does Not Remedy, Its Endorsement

The Sunrise Rock property is subject to extensive regulatory control because it is located within the boundaries of a national preserve. The Government concedes (Br. 41 n.6) that NPS has regulatory authority of inholdings related to solid waste disposal and mineral rights. More broadly, the Government is authorized by statute to take, without the consent of the owner, any inholding if "the property is being developed, or proposed to be developed, in a manner which is detrimental to the integrity of the preserve or which is otherwise incompatible with the purposes" of the statutes

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[18] The Government tries to distinguish *Eaton* because the local government's involvement with the hospital extended beyond its reversionary interest. Br. 44 n.8. But the *Eaton* court recognized the reversionary clause as "the most significant evidence of the state's involvement in the hospital's affairs." 329 F.2d at 713. In addition, as discussed below (*see* Part II.A.2-4, *infra*), the Government's control over the Sunrise Rock property extends far beyond its reversionary interest.

establishing the Preserve. 16 U.S.C. § 410aaa-56. That statutory authority is exercised in the Preserve's General Management Plan, which states that NPS "authority extends not only to federal lands, but to private inholdings and adjacent private land where activities carried out on those lands interfere with the designated use of the federal lands."[19]

NPS's power to ensure that the character of the transferred land at Sunrise Rock remains consistent with the character of the Preserve is exactly the sort of control that promotes the perception of government endorsement. The manager of the government land actually has the duty to ensure that the private land is used in a manner consistent with the millions of acres of government-owned land surrounding it. An objective observer traveling through the uniform Preserve landscape would "unquestionably perceive" that the Cross has been "stamped" with the Government's "seal of approval." *Santa Fe*, 530 U.S. at 308.

3. The Government's Regulatory Authority Over National Memorials Underscores, and Does Not Remedy, Its Endorsement

Because Congress proclaimed the Cross a "national memorial," NPS has additional statutorily imposed obligations to care for and maintain the transferred property. Section 2 of Title 16 requires the NPS director,

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[19] U.S. Dep't of the Interior, National Park Service, *Mojave National Preserve General Management Plan* 78 (2002); *see also* General Management Plan Abbreviated Final Environmental Impact Statement Mojave National Preserve, California, 67 Fed. Reg. 17,441-02 (Apr. 10, 2002) (prohibiting development on inholdings that is "detrimental to the integrity of the Preserve or otherwise incompatible with the [California Desert Protection Act].")

"under the direction of the Secretary of the Interior [to] supervis[e], manage[], and control ... national parks and national monuments ... and reservations of like character as may be created by Congress." This responsibility includes care of the Mojave National Preserve. 16 U.S.C. § 410aaa-46(a) ("The Secretary shall administer the preserve in accordance with this part and with the provisions of law generally applicable to units of the National Park System[.]").

Because Congress designated the acre at Sunrise Rock "as a national memorial" (16 U.S.C. § 410aaa-56 (note)), it also falls within the NPS authority to care for "national monuments." *Id.* § 2; *see also id.* § 431 (identifying national memorials as a category of national monuments); *infra* n.27. Since the land transferred by the 2004 Act is coterminous with the national-memorial designation, the transfer does little or nothing to diminish Government control. Congress merely switched the source of the Secretary's authority to manage the property from one provision (16 U.S.C. § 410aaa-46) to another (*id.* § 2). Moreover, the 2004 Act explicitly required that the NPS continue to fulfill the requirements of the 2002 Act, including treating the land and Cross as a national memorial.[20]

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[20] Although the Government now argues that the national-memorial designation "has no legal significance" (Br. 41-42) and that the 2004 Act "does not require any ongoing federal control over the memorial" (*id.* at 45), it argued differently before the court of appeals. There, the Government admitted that the designation requires the NPS to "treat[] the cross and the adjoining Preserve property identified by the Secretary as a memorial" (Pet. C.A. Br. 38), and that the 2004 Act required NPS to continue such treatment after the transfer (*id.*). The Government's original ar-

4. The Government's Easement Underscores, and Does Not Remedy, Its Endorsement

Finally, even the one-time requirement that the Secretary install a plaque at the site demonstrates Government control that furthers its endorsement of religion. The district court found that this obligation constituted an easement over the land. Pet. App. 93a. Although the Government represents that the Secretary intends to defy Congress and not acquire a replica cross (Br. 37 n.5), it is not yet clear how the Secretary will install the plaque—for example, whether the plaque will state that it was installed by the Government. What is known, however, is that the Secretary has an existing right and obligation to go onto the land to place the plaque.[21]

B. The Reversionary Clause Requires Continued Display of the Cross

Beyond simply demonstrating Government control of the Sunrise Rock property (*see* Part II.A.1, *supra*), the reversionary clause in the land transfer may require the display of the Cross itself. The 2002 Act designates the "five-foot-tall white cross [and adjoining property] ... as a national *memorial commemorating*

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gument correctly acknowledged that the designation conveys to the NPS a regulatory responsibility preserved in the 2004 Act.

[21] The Secretary's obligation to install the plaque, required by the statutory text to be a "replica," also underscores the absurdity of the Government's claim (Br. 33) that Congress did not intend to constrain the VFW to maintain the Cross. A replica of the original plaque, which describes the Cross, would be meaningless if the VFW removed the Cross.

United States participation in World War I, and honoring the American veterans of that war." 2002 Act § 8137(a). When Congress attempted to transfer the property to the VFW, it included a reversionary clause conditioned on the maintenance of a memorial described in *identical* terms:

> REVERSIONARY CLAUSE. — The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a *memorial commemorating United States participation in World War I and honoring the American veterans of that war.* If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

2004 Act § 8121(e). The court of appeals correctly concluded that "the cross itself is the memorial" and that removal of the Cross would trigger the reversion. Pet. App. 21a.

The Government's attempt to explain away the reversionary clause rests entirely on a single word. According to the Government, because Congress required that the VFW "maintain the conveyed property as 'a' war memorial, not 'the' war memorial" (Br. 33), the VFW is not required to maintain the present memorial.

Congress's use of the indefinite article cannot bear the weight that the Government places upon it for three reasons. First, the reversionary clause requires the VFW to maintain a memorial meeting the exact 17-word description supplied for the Cross in Section 8137. It is a basic canon of statutory construction that identical terms should be presumed to have the same meaning (particularly where, as here, those terms are used

in the same context). Thus, where Congress used the same precise phrase to describe the memorial in both the national-memorial designation and the reversionary clause, it was referring to the same memorial.

Second, the reversionary clause requires the VFW to "maintain" the memorial. As this Court has explained, "[t]he ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'" *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 433 (2002) (quoting *Random House Dictionary of the English Language* 1160 (2d ed. 1987)). This ordinary meaning would be defied by a construction that permits the VFW to dismantle the present memorial and to create a new one. Because Congress required the VFW to "maintain" the property as a memorial, not only to "use" the property as such, the clause must be read to require the VFW to maintain the Cross.

Third, as discussed in Part I.C.2, *supra*, the "conveyed property" protected by the reversionary clause must be read to include the Cross, not just the land beneath it. Any other reading would mean that Congress's "conveyance" included only the land adjoining the Cross, and that the Government retained ownership of the Cross itself. Because the VFW is required to maintain the conveyed property—including the Cross—its removal or destruction of the Cross would trigger the reversionary clause.

Thus, the reversionary interest in this case is conditioned on continuation of exactly the same activity deemed an Establishment Cause violation when the Government held the property. As a result, "an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive

it as a state endorsement of" religion. *Santa Fe*, 530 U.S. at 308.[22]

C. Congress Preserves the Cross Display With Threats of Civil and Criminal Consequences

The Government has created two mechanisms triggered by the removal of the Cross that, if enforced, would result in civil and criminal penalties for the VFW. First, the reversionary clause discussed in Part II.B, *supra*, if executed, would deprive the VFW of the land at Sunrise Rock. Second, removal of the Cross could subject the VFW to prosecution under 18 U.S.C. § 1369, which makes it a crime to "injure or destroy, any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States."[23] Notwithstanding the Government's argument of a low *probability* of the application of these statutes, the *possibility* of their application encourages the display of the Cross atop Sunrise Rock. The only way that the VFW can be *certain* that it will not lose its land or face prosecution is to continue displaying the Cross.

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[22] This reversionary clause is unlike the one in the Government's principal case, *Freedom from Religion Foundation* v. *City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000), because the clause in that case did not so tightly bind the recipient to maintain the religious display on the transferred land, but rather only "restrict[ed] the use of the parcel to public park purposes."

[23] A federal prosecutor might charge under Section 1369 if he understood the pervasive government control of the land or the national-memorial designation of the Cross to bring the site within the statute. *See also* Resp. Br. 44-45 & nn.30-31 (describing possible application of Section 1369 to VFW's removal of the Cross).

The Government concedes that the reversionary clause could be read to permit the Secretary to seize the acre at Sunrise Rock if the VFW removes the Cross, but argues that Secretary Salazar or some future Secretary could use his discretion under the clause to avoid violating the Constitution. Br. 43 ("This Court should presume that the Secretary will exercise his discretion consistently with the Establishment Clause."). As a practical matter, however, the risk that the Secretary might do otherwise sharply circumscribes the VFW's ability to end the Cross display. Rather than trusting in the discretion of the Secretary to allow the VFW to retain the land even if the organization removes the Cross that Congress has long fought to protect, practically speaking, the VFW will never remove the Cross to avoid the possibility of reversion.

Moreover, the Government's approach would prevent the judiciary from invalidating unconstitutional laws that require implementation by a public official. For example, criminal laws, which are enforced at the discretion of prosecutors sworn to uphold the Constitution, could not be invalidated. Citing *National Archives & Records Administration* v. *Favish*, 541 U.S. 157 (2004), the Government posits (Br. 43) that an endorsement of religion by Congress is not unconstitutional if an executive branch official may act to minimize or eliminate the endorsement. *Favish* does not mandate anything like the abdication of judicial review the Government proposes. *See* 541 U.S. at 174 (requiring evidence of public interest related to government misfeasance to overcome privacy interest in FOIA, given presumption of no misfeasance; "presumption ... less a rule of evidence than a general working principle"). The discretion granted to the Secretary is not a

buffer that prevents the invalidation of an unconstitutional law.

Furthermore, 18 U.S.C. § 1369, which imposes criminal penalties for injuring veterans' monuments, also creates a substantial practical impediment to the VFW's removal of the Cross. The Government argues that "this Court should construe Section 1369 ... to avoid casting constitutional doubt on Congress's transfer of the land." Br. 42. This argument concedes that Section 1369 could fairly be read to criminalize the VFW's removal of the Cross. The threat of criminal penalty will surely chill the VFW's inclination to remove the Cross. *Cf. Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956-957 (1984) ("rather than risk punishment for his conduct in challenging the statute," an individual instead "will refrain from engaging further in the protected activity").

III. Congress's Designation of the Cross as a "National Memorial" Exacerbates the Unconstitutional Governmental Endorsement of the Cross's Religious Message

As noted, in 2002, Congress designated the "five-foot-tall white cross" at Sunrise Rock as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." 2002 Act § 8137(a). No other World War I memorial bears that designation. With this designation, the United States has declared that Latin cross an important site of national significance and has publicly announced its endorsement of the Cross's message.

The Government's embrace of that message is so troubling because—in labeling that Christian symbol a memorial to World War I veterans—the Government has ignored—and thereby even denigrated—the ser-

vice of non-Christian veterans, including the 250,000 Jews who fought for the United States in World War I.[24] Rather than honoring non-Christian veterans, the Government's sponsorship of the Cross sends the message to non-Christian veterans "that they are outsiders, not full members of the political community."[25] Thus, even if the transfer effected by the 2004 Act satisfactorily cured the Establishment Clause violation—and for the reasons set out in Parts I and II, it does not—the 2002 designation alone unconstitutionally places the Government's imprimatur on a religious symbol.

Congress has in public laws declared approximately fifty sites that commemorate historic persons or events as "national memorials." Some—like Mount Rushmore or the Washington Monument—are familiar, while others—like the Astronauts Memorial at Florida's JFK Space Center or New Orleans' Buffalo Soldiers Memorial—are less well known. The vast majority of these memorials, including the "White Cross World War I Memorial" at Sunrise Rock, are listed in 16 U.S.C. § 431.[26] National memorials are administered as units of the NPS.[27] About fifteen of these national memori-

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[24] Fredman & Falk, *Jews in American Wars* 38 (1942).

[25] *McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309, and *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[26] Others are included elsewhere in Title 16. *See, e.g.*, 16 U.S.C. § 450nn (General Grant National Memorial, popularly known as "Grant's Tomb"); *id.* § 450ss-2 (Oklahoma City National Memorial).

[27] National "memorials" are a subspecies of the broader group of national "monuments." *See* 16 U.S.C. § 431 (note) (listing na-

als, including the Vietnam Veterans Memorial and the U.S. Marine Corps Memorial, relate to the commemoration of war or veterans.[28] The Sunrise Rock Cross is the only national memorial dedicated to honoring veterans of the First World War.[29]

The Government asserts that Congress's designation of the Cross as our national World War I memorial "has no legal significance." Br. 41. By this, the Government apparently means that the designation "does not transfer any regulatory authority over private property to the government." *Id.* As discussed in Part II.A.3, *supra*, this assertion is incorrect. The statutory

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tional monuments, including category of "national memorials"). As one former NPS official wrote, "uniformity and consistency are not characteristics of park system nomenclature." Rettie, *Our National Park System* 40 (1995). Our park system has the "most complex, the most carefully articulated, and thus the most specific system in the world," with twenty-one types of units including national parks, seashores, monuments, and memorials. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 Denv. U. L. Rev. 575, 576 (1997). To address the confusion created by these varying labels, in 1970 Congress passed the General Authorities Act, which broadly defined the park system to include all areas administered by the NPS and declared that previous statutory references to narrow categories of park system units should "not be construed as limiting such Acts to those areas." Pub. L. No. 91-383, § 2, 84 Stat. 825, 826 (1970).

[28] Other war-related memorials include the Battle of Midway National Memorial, the National D-Day Memorial, the Prisoner of War/Missing in Action National Memorial, and the U.S. Navy Memorial. 16 U.S.C. § 431 (note).

[29] During the current session of Congress, representatives from Missouri have introduced legislation to designate the Liberty Memorial in Kansas City, Missouri as the "National World War I Memorial." *See* H.R. 1849, 111th Cong. (2009); S. 760, 111th Cong. (2009).

designation of the Cross as a national memorial makes it a unit of the national park system over which the Secretary, through the NPS, has the statutory powers of "supervision, management, and control." 16 U.S.C. § 2.

Perhaps more importantly, even if the Government had no enhanced regulatory authority over the Sunrise Rock Cross, observers are likely to attribute the Cross's message to the Government because of the act of designation, without more. In *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), this Court explained that when the government accepts donations of monuments from private entities for display on government property, observers of those monuments "routinely—and reasonably—interpret them as conveying some message on the property owner's behalf," because it is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 1133. The Court noted that governments "exercise[] selectivity," "tak[ing] some care" to "select the monuments that portray what they view as appropriate." *Id.* Because of that selectivity, "[t]he monuments that are accepted ... are meant to convey and have the effect of conveying a government message." *Id.*

Just as privately donated monuments on public property convey a government message, so *a fortiori* do statutorily designated national memorials. Observers reasonably interpret national memorials as conveying federal endorsement because the Government does not designate as national memorials those "monuments that convey a message with which [it] do[es] not wish to be associated." *Pleasant Grove*, 129 S. Ct. at 1133. To the contrary, national-memorial designation is Con-

gress's most straightforward means of associating with a monument's message.

Indeed, the Government's association with the message of a national memorial is much stronger than its association with the message of a privately donated monument. National-memorial designation is far more selective, as Congress has selected only fifty sites as memorials from the innumerable possibilities. And while a donated monument is accepted only in response to a private offer, the national-memorial designation is initiated by the Government, affirmatively demonstrating the strength of governmental support for the memorial's message.

The United States Government has designated only one memorial to honor the four million American veterans of World War I: the Sunrise Rock Cross. That unadorned symbol of Christ's crucifixion and resurrection has been established by the federal government as our national means of honoring the American veterans of that war. By selecting the preeminent symbol of Christianity to commemorate World War I veterans, the Government has implied that only Christian veterans are worthy to be honored. Yet in World War I, more than 250,000 Jews answered America's call to action: more than 3,500 were killed; more than 12,000 were wounded; and more than 1,100 received decorations for bravery. *See* Fredman & Falk, *supra* n.24, at 38-40. It denigrates their service and sacrifice, and those of other non-Christians, to purport to honor them with the display of the profoundly religious symbol of another's faith.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2009

AMICUS CURIAE BRIEF

131

21

No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has affiliate attorneys throughout the country. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. More particularly, Liberty Counsel has represented and is representing governmental entities against challenges to historical displays that include the Ten Commandments, including McCreary and Pulaski counties in *McCreary County v. ACLU*, 545 U.S. 844 (2005).

A significant issue in *McCreary County* was the continuing viability of the *Lemon* test, and in particular the historical analysis undertaken as part of the purpose prong. *See id.* at 871-873 (majority opinion), 900-903 (Scalia, J. dissenting). That issue, and more specifically the concept of the religious "taint" attached to prior

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

governmental actions, has become problematic in appellate courts' analyses of Establishment Clause challenges, including in the decision below.[2] One appellate panel has called the current state of Establishment Clause jurisprudence "purgatory." *See ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). Liberty Counsel is concerned about the detrimental effects the reasonable observer standard and *Lemon* test have had on public entities and believes that it is critical that this Court has as complete a picture as possible of the ramifications of the *Lemon* test and the wisdom of retaining it.

Based upon the above, Liberty Counsel respectfully submits the following Amicus Brief for the Court's consideration.

SUMMARY OF ARGUMENT

What was true in 2005 is even more true today – the *Lemon* test is an unworkable standard that has caused more confusion than clarity. Government officials and appellate judges have been forced to journey through a maze fraught with wrong turns, dead ends and confusing guideposts that lead to contradictory results even with virtually identical factual scenarios.

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2. *Buono v. Kempthorne (Salazar)*, 502 F.3d 1069, 1085 (9th Cir. 2007); *see also, e.g., ACLU v. Mercer County*, 432 F.3d 624, 632 (6th Cir. 2005); *ACLU v. Grayson County* 2008 WL 859279 (W.D. Ky. 2008), *appeal pending* Sixth Circuit Court of Appeals Case #08-5548; *ACLU v. Rutherford County*, 209 F. Supp. 2d 799, 811-812 (M.D. Tenn. 2002).

Cases decided since this Court's opinions in *McCreary County* and *Van Orden v. Perry*, 545 U.S. 677 (2005), have exacerbated the chaos arising from continuing application of the *Lemon* test to Establishment Clause challenges of government displays. In particular, identifying the "reasonable observer" and defining his knowledge and memory in order to determine whether a display evinces an impermissible religious purpose has proven to be a Sisyphean task. Without bright-line rules to guide them, judges have had to engage in ad hoc, subjective determinations which offer no guidance to government officials trying to comply with the Establishment Clause or to other judges struggling to address similar challenges. The result is a patchwork of inconsistent and contradictory opinions between and within circuits, and even contradictory opinions issued by the same judge only nine days apart. This case encompasses one of those opinions and brings into sharp focus the unworkability of the *Lemon* test.

The time has long passed to euthanize the *Lemon* test and to adopt a standard that will provide clarity and consistency for citizens, government officials and the courts. An objective standard such as a coercion test would bring the Court's Establishment Clause jurisprudence more in line with the First Amendment, this country's heritage, and this Court's historical interpretation of the clause. Liberty Counsel respectfully requests that the Court consider adopting such a standard.

LEGAL ARGUMENT

Rather than serving as a guidepost, the *Lemon* test has become a millstone around the necks of government officials and a miry bog for judges. The fractured decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005), have been followed by equally fractured and inconsistent appellate court decisions.

The uncertainty and inconsistency flowing from the *Lemon* test has transformed the straightforward concept of not establishing a religion into an "Establishment Clause purgatory." *See ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). That characterization is borne out where an identical display is found constitutional in one venue but unconstitutional in another based upon the alleged subjective intent of government officials. The inter-circuit and intra-circuit conflicts regarding whether a government display violates the Establishment Clause demand that the *Lemon* test be jettisoned and a new test be adopted, at least as it relates to government displays or religious acknowledgments. This case brings the problem into sharp focus as it shows inconsistency not merely between two judges on the same court, but two opinions by the same judge. *Compare Buono v. Kempthorne [Salazar]*, 502 F.3d 1069 (9th Cir. 2007) with *The Access Fund v. USDA*, 499 F.3d 1036 (9th Cir. 2007). A standard that permits the same judge to find a regulation prohibiting access to a rock sacred to Native Americans constitutional (Access *Fund*), but a statute preserving a 75-year-old war memorial that includes a cross unconstitutional (*Salazar*) cannot remain the benchmark for analyzing Establishment Clause claims.

Of particular concern is the concept of "religious taint" that was pivotal in this Court's finding of impermissible religious purpose in *McCreary County* and the Ninth Circuit's decision in this case. *Salazar*, 502 F.3d at 1085 (finding that Congress' approval of a land transfer evinced a religious purpose because the history of Congress' actions to preserve the war memorial reflected "herculean efforts" to preserve a sectarian religious symbol). Religious "taint" has exacerbated the problems caused by the *Lemon* test. Under the theory of "religious taint," government officials are subjected to indeterminate prohibitions against erecting or maintaining displays if at any time in the past someone directly or even remotely affiliated with the government might have had a religious motive. Despite sincere efforts by government officials to change course while maneuvering through *Lemon*'s land mines, the taint of the past continues to haunt future actions for an indeterminate period. This case is a particularly egregious example of the problem, but is representative of the confusion caused by the *Lemon* test and the critical need to replace its arbitrary, subjective standards with an objective test.

I. THE CONFUSION CAUSED BY THE *LEMON* TEST, AS EXEMPLIFIED IN THIS CASE AND OTHER GOVERNMENT DISPLAY CASES, DEMONSTRATES THE NEED FOR A SUBSTANTIAL REVISION OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

A. The *Lemon* Test Has Become An Unworkable Standard For Analyzing Establishment Clause Challenges.

Twenty years have passed since Justice Kennedy said that a "substantial revision of our Establishment Clause doctrine might be order." County *of Allegheny v. ACLU,* 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part, dissenting in part). The ensuing two decades of government display cases have demonstrated that the revision is long overdue. Justice Scalia's comment that "more decisions on the subject have been rendered, but they leave the theme of chaos securely unimpaired" is more true today then ever. *Edwards v. Aguilard,* 482 U.S. 578, 640 (1987) (Scalia, J., dissenting). As Justice Scalia observed:

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause

> (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.

Id. at 636. Justice Scalia continued:

> In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility." *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. [646], at 662, 100 S.Ct. [840], at 851 [(1980)]. One commentator has aptly characterized this as "a euphemism . . . for . . . the absence of any principled rationale." [citation omitted]. I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning *Lemon*'s purpose test – a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences – would be a good place to start.

Id. at 639-640. Former Chief Justice Rehnquist similarly called for abandonment of the purpose prong, which he said is not "a proper interpretation of the Constitution,"

has "no basis in the history" of the First Amendment and "has proven mercurial in application." *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, C.J., dissenting). "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Id.* at 112.

Justice Scalia has similarly called the *Lemon* test " meaningless." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting). "The problem with (and the allure of) *Lemon* has not been that it is "rigid," but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire." *Id.* In his dissent in *McCreary County*, Justice Scalia pointedly described the flaws in *Lemon*'s reasonable observer standard and the concomitant concept of "religious taint" resulting from prior governmental actions:

> As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an " 'objective observer.' " Because in the Court's view the true danger to be guarded against is that the objective observer would

> feel like an "'outside[r]' " or " 'not [a] full membe[r] of the political community,' " its inquiry focuses not on the actual purpose of government action, but the "purpose apparent from government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.

McCreary County v. ACLU, 545 U.S. 844,900-901 (2005) (Scalia, J., dissenting). "[T]he legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion," *Id.* at 901, or, as the Ninth Circuit said in this case, had that intention at some time in the past.

> By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

Id. at 902-903. The "religious taint" doctrine carries the "rigorous review" to the extreme as the court combs through the history of the display searching for any hint of recognition of religion. If any hint is found at any point in history, then the display may be deemed "tainted" with religious purpose. The "taint" remains indefinitely until some as yet unidentified action sufficiently scrubs the display clean. As Justice Scalia said, this antagonism toward religion is antithetical to the constitutional provisions that the doctrine is supposed to be protecting.

Justice Alito has also rejected the "religious taint" doctrine. In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU challenged Jersey City's holiday display containing a creche as unconstitutional. The district court initially enjoined the display and "any substantially similar scene or display." *Id.* at 96. The city erected a modified display that included the original elements plus Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id.* The District Court initially determined that the modified display was constitutional, but then reversed itself and entered judgment in favor of the ACLU. *Id.* at 97. Justice Alito, speaking for the Third Circuit, rejected the district court's conclusion that the display was unconstitutional because of the "taint" attached to the prior display:

> The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade

> constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to the one that would be permissible in other nearby cities, counsel for the plaintiffs insisted that Jersey City's "prior history" would have to be taken into account, at least until the time came when it could be considered to be "purged" of the "prior constitutional taint."
>
> We reject this argument. The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (citations omitted). The Court added:

> If the plaintiffs' view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse [in *County of Allegheny*] should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

The *McCreary County* majority said that "we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter," but did not provide any guidance regarding how or when a "taint" would be deemed removed. *McCreary County*, 545 U.S. at 874. Consequently, neither government officials nor appellate courts can determine when past actions have been sufficiently erased from the reasonable observer's memory to permit erection of a new display. That dilemma is reflective of the problem with the *Lemon* test overall and demonstrates why the time is right to abandon the *Lemon* test and adopt a new objective standard for Establishment Clause challenges of government displays.

B. This Court Should Abandon *Lemon* And Adopt An Objective Test To Restore Clarity And Consistency To Establishment Clause Analysis.

As this Court has acknowledged, the wide variety of governmental functions that might be challenged under the Establishment Clause means that there cannot be a "one size fits all" test. "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring in part).[3]

3. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004)(O'Connor, J., concurring); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 852 (Cont'd)

It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (Stevens, J., concurring). But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order, and so on – are present in different degrees in each context. And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free

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(Cont'd)

(1995)(O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting)(citing *Grumet*, 512 U.S. at 751); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)(no "single test or criterion") (citing cases).

> speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

Id. at 718-719. As is true with Free Speech cases, Establishment Clause challenges involve different contexts, including: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies, under which the issues underlying the clause will operate quite differently. *See id.* at 720. In other words, there are different standards and concerns with funding cases, church property or employment disputes, and government acknowledgments of religion. Establishment Clause concerns are more heightened in the former two than in the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are more likely to raise Establishment Clause concerns than "under God" in the Pledge of Allegiance, "In God We Trust" on our currency, passive displays that include the Ten Commandments or war memorials that include crosses. Any test must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment. However, as Justice O'Connor cautioned, "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more

precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Id.*

1. A new objective test should distinguish between acknowledgment and establishment.

Amicus proposes a two-part test for Establishment Clause challenges of passive government displays. Under this proposal, if a display (1) comports with history and ubiquity, and (2) does not objectively coerce participation in a religious exercise or activity,[4] then it would be deemed a permissible acknowledgment of religion, not a violation of the Establishment Clause.

a. History and ubiquity, properly applied, would distinguish acknowledgment from establishment.

The first part of Amicus' proposed test focuses on "history and ubiquity." Ubiquity in this context is not the dictionary meaning of "omnipresent," but a practice "observed by enough persons" to warrant the term. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). Ubiquity is less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on old traditions. Each Presidential invocation of God is both new and old. State

4. Acknowledgments do not violate *Larson v. Valente*, 456 U.S. 228 (1982).

mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity is helpful only to the extent that it illuminates historical tutelage, one of the two aspects of history, the other being historical meaning. Historical tutelage looks at historical practices to distinguish between mere shadows of religious acknowledgment versus real threats of establishment. References to God in the country's mottos, constitutions, historical documents and even legislative prayers, have neither established nor tended to establish religion and would, therefore, be regarded as mere shadows of religious acknowledgment, not establishments.

Whether a display has sparked controversy is not helpful in discerning between acknowledgment and establishment. Longstanding practice and the lack of controversy do not create "a vested or protected right" to violate the Constitution *Id.* at 39. However, the presence of controversy can undercut a constitutional practice. *Id.* Litigation is, by definition, a controversy.[5]

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5. *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989)(O'Connor, J., concurring)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002) ("prosecuting a lawsuit" cannot serve to create "divisiveness") (quoting *Aguilar v. Felton*, 473 U.S. 402, 229 (1985) (O'Connor, J., dissenting)).

Relying upon controversy could create a "heckler's veto," which would doom such acceptable practices as Sunday closing laws and school funding, which were the subjects of numerous lawsuits.[6]

What is relevant, then, is whether history reveals that a practice has established or tended to establish religion. An historical meaning analysis should look for the best understanding of the purposes of the Establishment Clause, for which there is some agreement. Some general assumptions regarding the meaning of the Establishment Clause include that government cannot establish a church, discriminate among sects, or objectively compel a certain sectarian belief.[7] There are divergent opinions beyond these areas,

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6. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 32 (2004)(Rehnquist, C.J., concurring); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 119 (2001)(refusing to employ "a modified heckler's veto"); *McGowan v. Maryland*, 366 U.S. 420, 435 (1961)("litigation over Sunday closing laws is not novel. Scores of cases may be found in state appellate courts."); *id.* at 527-36 (Frankfurter, J., concurring)(listing cases).

7. *See, e.g., Newdow*, 542 U.S. at 31 n.4 (Rehnquist, C.J., concurring)(distinguishing between compulsion and coercion); *id.* at 50-51 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *County of Allegheny*, 492 U.S. at 590-91 (summarizing the Establishment Clause); *id.* at 659-63 (Kennedy, J., concurring in part, dissenting in part). *See also* Philip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). There seems to be some agreement on direct coercion and less on indirect.

but this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice . . . is not something to be lightly cast aside."[8]

b. A coercion analysis should focus on compulsion rather than psychological coercion.

The coercion factor in the proposed objective test would be more akin to compulsion than to psychological coercion. Governmental acknowledgments of religion are pervasive. The mere presence of a religious symbol or statement that is pervasive historically and physically does not send a message of compulsion. Acknowledgments such as passive displays are far less

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8. *Newdow*, 542 U.S. at 39 (O'Connor, J., concurring)(quoting *Walz*, 397 U.S. at 678); *Lynch*, 465 U.S. at 668; *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the contributions of James Madison and Thomas Jefferson are relevant, they are not dispositive. Madison was not an ardent proponent of the Bill of Rights. His original draft was not adopted, his opinions shifted later in life, and he acted in ways some members of this Court describe as falling short of his ideals. Jefferson did not participate in drafting or debating the First Amendment. Both supported prohibiting clergy from holding political office and both condoned confiscating church-owned glebe lands, an act possibly understandable then but an extreme separationist position now. *See Lee v. Weisman*, 505 U.S. 577, 624-26 (1992)(Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-99 (1985)(Rehnquist, J., dissenting); *McDaniel v. Paty*, 435 U.S. 618, 623 (1977); Mathew D. Staver and Anita L. Staver, *Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches*, 33 CUMBERLAND L. REV. 43 (2003).

likely to pose a real threat of coerced belief than are other forms of governmental involvement with religion such as the state churches that were a concern for the Founding Fathers. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Newdow*, 542 U.S. at 39. The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part).

A display does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 576. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 569-60. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662. "Any coercion that persuades an onlooker [to view the veterans' memorial] is inconsequential as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 542 U.S. at 44 (O'Connor, J., concurring). "Symbolic references to religion," like the cross in the Sunrise Rock memorial, will pass the coercion test. *Id.* There is neither subtle nor direct coercion at issue with the memorial. It is not

located in a high traffic area in a public park, but atop a rock in the middle of the Mojave Desert. Visitors are not compelled to pass by the monument. In fact, the monument would be barely visible to most people driving by on the interstate.

Similar to the Ohio Motto ("With God All Things Are Possible") which the Sixth Circuit upheld, the Sunrise Rock veterans' memorial

> does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. And, as far as we can see, its [posting by the courthouses] does not represent a step calculated to lead to any of these prohibited ends.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (2001) (en banc).

Displays such as Sunrise Rock do not elevate one sect over another in violation of *Larson*, even if they contain a sectarian symbol. For example, it is irrelevant that a creche is sectarian or whether it is displayed on

December 25 instead of January 6, the day Christ's birth is celebrated by some Christians, because the religious symbol alone does not determine endorsement – history and context do. This Court rejected an argument based upon *Larson* that a creche, which "is identified with one religious faith," discriminates among sects. *See Lynch*, 465 U.S. at 685, 687 n.13. Similarly this Court has found that the Sabbath has a secular application and references to God merely acknowledge the historical fact that "we are a religious people" and "[o]ur history is replete with official religious references. . . ." *Id.* at 675 (citation omitted). As the dissenters in *Lynch* commented, the "chief symbol" of the "Christian religion" was upheld even though its sectarian message was not neutralized. *See id.* at 705-08 (Brennan, J., dissenting).

Like the menorah, the Latin cross is religious, but the "message is not exclusively religious." *County of Allegheny*, 492 U.S. at 613. But, even if it were exclusively religious, it would not affect the result here because the history of this display in particular, and the Latin cross in general as a memorial, does not establish a religion, nor has it tended to do so. Hanukkah need not be characterized as a secular holiday, or the menorah as having a secular dimension, to conclude that such a holiday display "does not convey a message of endorsement of Judaism or of religion in general." *Id.* at 634 (O'Connor, J., concurring). This conclusion "does not depend on whether or not the city [could have used] 'a more secular alternative symbol.' " *Id.* at 636. Requiring that the government use a " 'more secular alternative' [if] available is too blunt an instrument for Establishment Clause analysis." *Id.*

2. A new objective test should comport with history and treat passive displays less harshly than more intrusive government involvements with religion.

Whatever test is adopted for Establishment Clause challenges of government displays, it should comport with history and not wipe away the country's heritage. Furthermore, the test should not treat passive displays more harshly than this Court's cases addressing governmental funding. The history of religious school and institutional funding cases supports the argument that a passive memorial containing a cross is constitutional. In 1947 this Court in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15-16 (1947), issued its oft-repeated (and quite frankly erroneous) statement about the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form

> they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Although the Establishment Clause was said to prohibit a "tax in any amount, large or small" being "levied to support any religious activities or institutions," the *Everson* court approved government funding for bus transportation of children attending parochial schools. *Id.* at 15-18. This Court has also declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[9] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that

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9. *See e.g., Zelman*, 536 U.S. at 639 (vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deduction); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (revenue bonds for colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants for colleges); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Medicare funds used by sectarian healthcare providers pose no constitutional problem.[10] Although guiding principles in government funding cases have been neutrally available benefits and private choices, those decisions have permitted at least the indirect advancement of institutions' religious missions.

If the Establishment Clause reaches its apex in government funding of sectarian institutions and permits funding that at least indirectly advances the religious mission, then a passive display of a cross commemorating war dead must be found to comport with the Establishment Clause. If governmental funding has not raised the shadow of an established religion, then the World War I memorial standing atop a rock in the Mojave Desert for more than 75 years certainly cannot.

Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols [including the war memorial in this case] pose a real danger of

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10. *See e.g., Zelman*, 536 U.S. at 667-68 (Medicare); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

establishment of a state church is farfetched indeed."[11] The existing analytical standard that permitted the Ninth Circuit to reach the "farfetched" conclusion that a 75-year-old war memorial containing a cross violates the Establishment Clause must be re-examined and replaced. The need for an objective test to replace *Lemon* test is all the more apparent when the Ninth Circuit's holding in *Salazar* is compared to its holding in *The Access Fund v. USDA*, 499 F.3d 1036 (9th Cir. 2007).

II. THE NINTH CIRCUIT'S INCONSISTENT OPINIONS IN *SALAZAR* AND *ACCESS FUND* ILLUSTRATE HOW *LEMON*'S PURPOSE PRONG HAS BECOME A SNARE FOR UNWITTING GOVERNMENT OFFICIALS.

Judge McKeown's inconsistent opinions in *Buono v. Kempthorne [Salazar]*, 502 F.3d 1069, 1072 (9th Cir. 2007) and *The Access Fund v. USDA*, 499 F.3d 1036, 1046 (9th Cir. 2007), cogently illustrate how *Lemon*'s purpose prong has left governmental agencies at a loss as to how to conduct business without facing an Establishment Clause challenge. They also exemplify why a new objective standard such as the test described above should be adopted in place of *Lemon*. The "rigorous

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11. *Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 (1985) (Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini v. Felton*, 521 U.S. 203 (1997). History confirms the Archbishop is still held at bay.

review" required to determine whether a reasonable observer would discern a religious purpose, and in particular whether prior actions have "tainted" a display, result in inconsistent conclusions from substantially similar facts.

A. The Ninth Circuit's Decision Illustrates How The *Lemon* Test Can Be Manipulated To Find An Impermissible Religious Purpose In A Seventy-Five-Year-Old War Memorial That Features A Latin Cross.

A war memorial in the form of a Latin cross has been in place at Sunrise Rock in the Mojave Desert continuously since 1934. *Salazar,* 502 F.3d at 1072. Beginning in 1935, people gathered intermittently at the site for Easter services, and those services became a regular occurrence in 1984. *Id.* According to the National Parks Service, those gatherings by private parties somehow transformed the war memorial into a religious shrine of sorts and thereby disqualified it from being included in the National Register of Historic Places. *Id.* at 1073. Based upon that, the parks service indicated that it was going to remove the memorial. *Id.* Congress stepped in and enacted a series of laws aimed at preserving the monument, including, most recently, a land exchange that would transfer ownership of the land upon which the monument rests to the Veterans of Foreign Wars in exchange for its donation of an equivalent piece of property to the parks service. *Id.* at 1075.

The Ninth Circuit concluded that Congress' actions evinced an impermissible religious purpose because

they represented "herculean efforts" to preserve "a sectarian religious symbol." *Id.* at 1085. According to the Ninth Circuit, the "reasonable observer" in *Salazar* could only view the proposed transfer of the subject property "as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.*

As Fifth Circuit Judge Edith Brown Clement commented, "A critic might argue that the Ninth Circuit was so determined to see this cross removed from a rock in the middle of the desert that it held that the government could not even *give* it away."[12] "The Ninth Circuit's inference that the cross's display constituted the establishment of Christianity also ignored many secular reasons Congress may have had in seeking to preserve the decades-old private war memorial, while at the same time not objecting to the Park Service's determination that new memorials on the same site were inappropriate."[13] "[T]he court gives insufficient weight to important historical and contextual factors in concluding that permitting the existing war memorial but prohibiting a new religious monument constituted per se evidence of an Establishment Clause violation."[14] Instead of acknowledging the historical and cultural significance of the memorial honoring all World War I

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12. Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After McCreary and Van Orden*, 32 HARV. J. L & PUB. POL'Y 231, 254 (2009).

13. *Id.*

14. *Id.*

veterans, the Ninth Circuit upheld the district court's finding that "the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion'. . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1081. In other words, efforts to preserve the memorial were "tainted" by religious undertones and nothing Congress did erased that taint.

B. The Panel Opinion In *Access Fund* Demonstrates How The *Lemon* Test Can Be Manipulated To Disguise An Obviously Religious Motivation As A Permissible Secular Purpose.

However, regulations protecting a site sacred to the Washoe religion from activities that the Native Americans viewed as sacrilegious did not have an impermissible religious taint according to Judge McKeown's opinion in *Access Fund*, 499 F.3d at 1046. While Judge McKeown ignored historical and cultural factors in *Salazar*, in *Access Fund* she strained to find historical and cultural factors to justify the regulations. *Id.* at 1044. "Historical and cultural considerations motivate the preservation of a national monument that may have religious significance to many or even most visitors." *Id.* at 1044. "Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally." *Id.* (citing *Bauchman v. West High School*, 132 F.3d 542, 554 (10th Cir.1997)).

> Indeed, such secular motivations lie behind the government's protection of many religious landmarks in this country, such as 'the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

Id. Interestingly, the court had not found a similar secular motivation behind the government's protection of the Sunrise Rock veteran's memorial.

Contrary to its conclusion in *Salazar*, in *Access Fund* the Ninth Circuit found that the Forest Service's regulation prohibiting rock climbing, which was offensive to Native American beliefs, but not other uses for Cave Rock near Lake Tahoe, "easily satisfied" the purpose prong of the *Lemon* test. *Id.* at 1043. Despite evidence that the Forest Service regulation was enacted to preserve Native American religious beliefs, the Ninth Circuit found no religious "taint" to counter its finding of a secular purpose. *See, id.* at 1041-1042.

The stark contrast between the opinions in *Salazar* and *Access Fund* demonstrate why the *Lemon* test should be replaced by a more objective standard. Secular purposes advanced by Congress to protect a memorial containing a cross were found to be a "sham" in *Salazar*, but Forest Service statements that its regulation was based upon culture and history, not religion, were credible and determinative. *Salazar*, 502 F.3d at 1085;

Access Fund, 499 F.3d at 1044. A test that permits the same court to find an impermissible religious purpose in a cross sitting atop a rock in the Mojave Desert, but no religious purpose in a regulation that preserves the integrity of a Native American religious site is, as Chief Justice Rehnquist said, of little use as a constitutional theory. *See Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). The inconsistent decisions in *Salazar* and *Access Fund* aptly demonstrate that the *Lemon* test purpose prong "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results." *Id.*

By contrast, an objective test such as the coercion test described above would use history grounded in the original meaning of the Establishment Clause to determine whether the monuments were permissible acknowledgments of religion or impermissible attempts to establish a religion. The monuments would be viewed in context to determine whether they compel an observer to believe that a certain doctrine is true or merely symbolize the place of religion in the history of a particular region or event. Application of that test to *Salazar* and *Access Fund* would yield the consistent and correct answer that neither monument violates the Establishment Clause.

III. INCONSISTENT OPINIONS IN OTHER RELIGIOUS DISPLAY CASES FURTHER ILLUSTRATE HOW THE *LEMON* TEST HAS CONFUSED INSTEAD OF CLARIFIED THE QUESTION OF WHEN A GOVERNMENT DISPLAY VIOLATES THE ESTABLISHMENT CLAUSE.

Justice Souter observed that the Court's emphasis on the history, and in particular the religious history, of a government display means that the same display could be constitutional in one instance and unconstitutional in another. *McCreary County v. ACLU*, 545 U.S. 844, 866 n.14 (2005). Such a result "presents no incongruity, however, because purpose matters." *Id.* In fact, the standard announced in *McCreary County* has resulted in tremendous nonsensical incongruity as courts struggle with a test that was difficult to use before *McCreary County* and has only become more so since then. This is particularly apparent in the inconsistent lower court decisions addressing passive displays of the Ten Commandments.

A. Inter-Circuit And Intra-Circuit Conflicts Regarding The Constitutionality Of Displays Featuring The Ten Commandments Illustrate How The *Lemon* Test Leads To Unprincipled Results.

The inconsistent decisions regarding displays that include the Ten Commandments demonstrate how, as Chief Justice Rehnquist predicted, the *Lemon* test and its purpose prong yield unprincipled results. *Wallace v.*

Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Historical displays that include the Decalogue have been found constitutional or unconstitutional, depending upon how the courts applied the purpose prong. Foundations of American Law and Government displays, which consist of nine documents in equally-sized frames, one of which is the Ten Commandments, have been donated by private parties and displayed in county government buildings throughout the country. Lawsuits claiming that the displays violate the Establishment Clause have been filed against counties in Kentucky, Tennessee and Indiana. Two such displays in McCreary and Pulaski counties in Kentucky were addressed by this Court when it upheld preliminary injunctions in *McCreary County*.[15] Since then, district court judges examining identical displays in other Kentucky counties have reached contradictory conclusions regarding their constitutionality. *ACLU of Kentucky v. Mercer County*, 240 F.Supp.2d 623 (E.D.Ky. 2003), *aff'd* , 432 F.3d 624, 636 (6th Cir. 2005) (finding the Foundations Display constitutional); *ACLU v. Rowan County*, 513 F. Supp. 2d 889 (E.D.Ky. 2007) (same); *ACLU v. Grayson County* 2008 WL 859279 (W.D. Ky. 2008), *appeal pending*, Sixth Circuit Court of Appeals Case #08-5548 (finding the

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15. On remand, the district court issued permanent injunctions against the McCreary and Pulaski county displays based upon a conclusion that the religious "taint" arising from the counties' earlier attempts to display the Ten Commandments had not been removed. That decision is on appeal to the Sixth Circuit, *ACLU of Kentucky v. McCreary County*, Case No. 08-6069.

Foundations Display unconstitutional).[16] A district court judge in Indiana also found the Foundations Display unconstitutional, but was overturned on appeal. *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (finding the Foundations Display constitutional).

In *Rowan County*, the district court found that a Foundations Display erected after the Ten Commandments had been displayed for two years satisfied the post-*McCreary Lemon* test. *Rowan County*, 513. F. Supp. 2d at 903. Before the Foundations Display was erected, the Ten Commandments were displayed without other historical documents, but not in isolation and not in a "high traffic area" of the courthouse. *Id.* Under those circumstances any religious message conveyed by posting the Ten Commandments was sufficiently diminished to satisfy the purpose prong. *Id.* "While the posting of the Ten Commandments without any other historical documents evidences a religious purpose, it is the Court's opinion that the message is diluted in comparison to the situations in other counties such as McCreary, Pulaski, and Garrard."*Id.* Garrard County Kentucky also had a Foundations Display that was challenged as unconstitutional. *ACLU of Kentucky v. Garrard County*, 517 F. Supp.2d 925 (E.D. Ky 2007). As was true in McCreary and Pulaski counties, in Garrard County, the Foundations Display was preceded by a display that featured the Ten Commandments and was posted in a high traffic area of the courthouse.

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16. A Tennessee district court judge also found the Foundations Display was likely unconstitutional under the purpose prong but constitutional under the effects prong. *ACLU v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).

Id. at 928. The district court denied the county's motion for summary judgment because there were factual questions about the purpose and effect of the Foundations Display in that instance. *Id.* at 945.

The same district court judge found that the Foundations Display placed in Mercer County, Kentucky's courthouse with no prior history of Ten Commandments displays satisfied the *Lemon* test. *Mercer County,* 240 F. Supp.2d at 626. The Sixth Circuit upheld the ruling under the *Lemon* test as modified by this Court in *McCreary County*. *Mercer County,* 432 F.3d at 636. However, another district court judge found that the identical Foundations Display in Grayson County Kentucky, also with no history of prior Decalogue displays, did not satisfy the *Lemon* test. *Grayson County,* 2008 WL 859279.[17] The *Grayson* court concluded that the Foundations Display violated the post-*McCreary Lemon* "predominant purpose" test because the government did not expressly state that it had a secular purpose for erecting the display and because the private donor of the display mentioned the Ten Commandments *before* he mentioned the other historical documents during a public comment period. *Id.* at *9. Viewed together, the Kentucky decisions hold that a "reasonable observer" in Mercer and Rowan counties would not understand the Foundations Display to have a predominantly religious purpose, but a "reasonable observer" in Grayson County would discern such a purpose, for reasons not at all apparent. Furthermore, according to the Seventh Circuit, a

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17. The Grayson County decision is on appeal. *ACLU of Kentucky v. Grayson County*, Sixth Circuit Case # 08-5548.

"reasonable observer" of the same display in Elkhart County Indiana would "think history, not religion." *Books*, 401 F.3d at 869. These decisions exemplify the kind of unprincipled results wrought by the *Lemon* test, and, particularly the fact-intensive predominant purpose standard.

Which "reasonable observer" might be applied in a particular case, and whether a government's prior actions will be viewed by him as having "tainted" the display with religious undertones so as to violate the Establishment Clause remain unanswered. Under the *Lemon* test, whether a Foundations Display is constitutional does not depend upon the content and context of the display, but upon how third parties would perceive the reason for the display. Such unpredictable findings demonstrate why the *Lemon* test must be replaced with an objective standard which would find that these passive displays of historical documents are a permissible, non-coercive acknowledgment of religion.

B. The Tenth Circuit's Conflicting Opinions Regarding Crosses On Government Seals Further Demonstrate Why *Lemon* Should Be Abandoned.

The inconsistent rulings by the Tenth Circuit illustrate how the *Lemon* test has created a land mine laden trail that even the most skilled governmental official is unable to maneuver successfully. An objective standard such as the coercion test described above would transform that trail into a smooth path lined with principled guideposts easily traversed by government officials and appellate court judges.

In *Robinson v. City of Edmond*, 68 F.3d 1226, 1228 (10th Cir. 1995), the Tenth Circuit found that a cross in one quadrant of the seal of the City of Edmond, Oklahoma, violated the Establishment Clause. The Tenth Circuit was not convinced by the city's explanation that the symbol represented the Christian heritage of the city, just as the oil derricks, sooner wagon, train and historical building represented other aspects of the city's heritage. *Id.* According to the court, the "average observer" would conclude that the presence of a cross in one quadrant of the seal represented the city's intent to honor Christianity and that conclusion would not be diminished by the secular components in the other three quadrants. *Id.*

On the other hand, the prevalence of crosses throughout Las Cruces, New Mexico, did sufficiently dilute any imprimatur that might have arisen from the city's seal featuring three interlocking crosses surrounded by a sun symbol. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017,1025 (10th Cir. 2008). The Tenth Circuit said that the unique history of the city and how it got its name militated against finding an impermissible religious purpose or effect. *Id.* at 1033-1034. The "reasonable observer" in that case would be aware of the history of the city and its name – that there were forests of crosses marking the gravesites of people who were killed near the city. *Id.* at 1034. "Because a city's symbol is shorthand for the entity itself – a pictograph of sorts – the use of crosses makes intuitive sense for a city named 'The Crosses.'" *Id.* at 1033-1034.

However, the same court found that a radiant cross in the seal of Bernalillo County, New Mexico, with the

motto "With This We Overcome" in Spanish, violated the Establishment Clause. *Friedman v. Board of County Comm'rs of Bernalillo County*, 781 F.2d 777, 781 (10th Cir. 1985) (en banc). As was true with the crosses in the Las Cruces seal, the cross in the Bernalillo County seal had been used for many years and was pervasive throughout the community. *Id.* at 779. The district court agreed with the government that the cross alluded to Spanish conquistadors who, accompanied by Catholic priests and friars, conquered the indigenous population of the area. *Id.* The Tenth Circuit disagreed, saying that the county's explanation "unmistakably suggests that it was the force of the Christian faith that powered the conquest and that it will continue to enable the County to overcome" *Id.* The Tenth Circuit was so zealous to find a violation that it said that the flock of sheep on the seal, which alluded to sheep-raising, was in fact an allusion to Jesus. *Id.* As the *Weinbaum* court observed, "with no principled basis for distinguishing one seal from the next, our opinions will be fastidiously fact-bound and our precedent hopelessly abstract." *Weinbaum*, 541 F.3d at 1039. That aptly describes the consequences of continued reliance upon *Lemon* and why *Lemon* should be abandoned in favor of an objective test.

CONCLUSION

For at least 20 years, members of this Court have said that its Establishment Clause jurisprudence needs to be revised. This case and other government display cases decided since 2005 cogently illustrate the need for a revision and in particular for abandonment of the *Lemon* test. Amicus Curiae Liberty Counsel urges this Court to abandon *Lemon* and adopt an objective standard for analyzing Establishment Clause challenges such as the coercion test described above.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior; JONATHAN B. JARVIS; and DENNIS SCHRAMM,

Petitioners,

v.

FRANK BUONO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioners*.

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation ("NLF") is a 501(c)(3) public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are particularly interested in assuring that constitutional case law not be misapplied by forcing governmental entities to remove from their land passive monuments that include religious themes or imagery.[1]

SUMMARY OF THE ARGUMENT

This Brief expands on two arguments made by Petitioners Salazar, *et al.* (the "Secretary"). Both of *Amicus's* arguments address aspects of whether the court below erred in its determination that an Establishment Clause violation existed prior to the Secretary's attempt to transfer the World War I memorial (the "Cross") to a local chapter of the Veterans of Foreign Wars (the "VFW"). Although the merits of an Establishment Clause violation are not explicitly set out in the questions before this Court, the court below based its analysis of the propriety of the land transfer on the incorrect conclusion that an Establishment Clause violation

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

would persist after the transfer would take place. Thus, the question of whether an Establishment Clause violation existed in the first place prior to the land being transferred to the VFW is "fairly included" in the question presented. Sup. Ct. R. 14(1)(a).

First, even if the Cross is perceived as primarily a religious and sectarian symbol, the longstanding use of Latin crosses as memorials to the dead (especially military memorials) protects the use of such crosses from constitutional attack. When a memorial, such as the Cross, is "deeply embedded in the history and tradition of this country" and has "become part of the fabric of our society," it should be afforded great deference as to its constitutionality. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The facts of the instant case suggest nothing to militate against that deference, and whether the government had continued its ownership and control of the Cross or transferred it to a private owner is irrelevant to the fact that the Cross is constitutionally permissible on public land.

Second, the court below erred in its assessment of the reasonable observer standard when it evaluated whether the Cross would reasonably be construed as an endorsement of religion. The court below attributed to the reasonable observer knowledge of several detailed, but exclusively negative, pieces of information about the Cross. Any reasonable observer, therefore, with the knowledge attributed to it by the court below, would certainly have also known one more critical

datum—namely that the Cross had been transferred to a private owner.

ARGUMENT

The Secretary has persuasively argued the precise questions before this Court—in particular that Buono lacks standing prosecute the suit under the particular facts he has alleged, and that, even if Buono has standing, the Act of Congress transferring the Cross to a private owner cured any Establishment Clause violation that may have existed. Importantly, however, not only would the transfer of the Cross have cured any Establishment Clause violation, no violation existed in the first instance. Further, no reasonable observer would have concluded the government was endorsing religion upon the transfer of the Cross to a private owner.

I. NO ESTABLISHMENT CLAUSE VIOLATION EXISTS BECAUSE OF THE LONG-STANDING HISTORY AND TRADITION OF THE GOVERNMENT USING CROSSES TO MEMORIALIZE THE DEAD AND SPECIFICALLY FALLEN SOLDIERS.

The Secretary, in discussing this Court's reasoning in *Van Orden v. Perry*, 545 U.S. 677 (2005), appropriately noted that "if the Establishment Clause permits the government to *display* a longstanding memorial with a predominantly secular message [as in *Van Orden*], . *a fortiori* it permits the government to *transfer* such

a memorial to a bona fide private recipient." (Pet'rs' Br. at 29 (emphasis in original).) Although it is true that both the monument at issue in *Van Orden* and the Cross in the instant case do evince a predominantly secular message, under the Constitution and this Court's precedents, a secular message need not predominate. In other words, even if this Court were to view the Cross as conveying a predominantly *religious* message, its existence on public land would still be constitutional; therefore, *a fortiori* the proposed land transfer including the Cross would also be constitutional because there would be nothing to "cure."

As mentioned above, the religious nature of the Cross notwithstanding, the Cross *on public land* remains entirely lawful under an exception to the *Lemon*-endorsement test, namely the test first articulated by the this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Newdow v. Bush*, 355 F. Supp. 2d 265, 283 (D.D.C. 2005) ("There are exceptions to the *Lemon* test . . . and one of those exceptions" is *Marsh*); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (referring to *Marsh* as an "exception to the *Lemon* test"); *ACLU v. Capital Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1182 (S.D. Ohio 1998), *aff'd* ,243 F.3d 289 (6th Cir. 2001) (finding *Marsh* an exception to *Lemon*). Notably, this Court implicitly reaffirmed *Marsh* by taking a *Marsh*-type approach in *Van Orden* to uphold a Ten Commandments monument on state property. Furthermore, the Cross is an acceptable symbol on federally owned land because Latin crosses are not necessarily exclusively religious.

A. *Marsh v. Chambers* controls when the issue before the court involves a "long-standing tradition" that has become part of the fabric of society.

In *Marsh*, this Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions "is deeply embedded in the history and tradition of this country," and that it had "become part of the fabric of our society." *Id.* at 786, 792. The Court emphasized that long-standing traditions should be given great deference. *Id.* at 788. The *Marsh* test asks whether a long-standing practice, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n.4 (1995) (Powell, J., concurring) (citation omitted). The plurality in *Van Orden* specifically referred to *Marsh* as an example of how the recognition of the role of religion in our nation's heritage is permissible under the Establishment Clause. *Van Orden*, 545 U.S. at 687-88 (plurality).

Writing for the plurality in *Van Orden*, Chief Justice Rehnquist noted that the constitutional analysis of the monument "is driven both by the nature of the monument and by our Nation's history." *Id.* at 686 (plurality). Chief Justice Rehnquist recognized that, "'[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* (plurality) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674

(1984)). He also cited the deeply embedded practice of recognizing the role religion has played in our nation's heritage. *Id.* at 687-88 (plurality).

Chief Justice Rehnquist compared the monument outside the Texas State Capitol with other Ten Commandment displays on government property, describing them as "acknowledgements of the role played by the Ten Commandments in our Nation's heritage," *id.* at 688-89 (plurality), and not as unconstitutional establishments of religion. Thus, the *Van Orden* plurality applied a *Marsh* analysis to the Texas Decalogue and stated that *Lemon* is "not useful" in dealing with a "passive monument." *Van Orden*, 545 U.S. at 686 (plurality).[2]

Courts have used *Marsh* to uphold practices such as public proclamations with religious content, *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army,

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[2] Justice Breyer's concurrence in *Van Orden* recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Justice Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 545 U.S. 844 (2005)—the other Ten Commandments case decided the same day—by noting that the *Van Orden* display is "simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document." *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985), and in a sheriff's department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase "in the year of our Lord" on law licenses and on notary public commissions, *Doe v. Louisiana Supreme Court*, No. CIV.A.91-6135, 1992 WL 373566, at *6-7 (E.D. La. Dec. 8, 1992); state involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc.*, v. State, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh*'s "fabric of society" language); prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002); *Newdow v. Bush*, 355 F. Supp. 2d 265; and directly in religious display cases, *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988), *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1995), *Conrad v. City and County of Denver*, 724 P.2d 1309, 1314 (Colo. 1986), *ACLU v. Capital Square Review & Advisory Board*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*), and *Murray v. Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia); and to help explain why displays should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v.City of Los Angeles*, 207 Cal. App. 3d 566, 576-77 (Ct. App.

1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

Marsh should control the analysis of any alleged Establishment Clause violation in this case because using crosses to memorialize the dead acknowledges the role of religion in American life as well as the use of religious symbols for secular purposes like honoring the nation's heroes, a practice our nation has heretofore not been shy to do.

B. The Cross is constitutional because use of religious imagery and crosses on public land is firmly rooted in our nation's history and traditions.

A brief survey of our nation's monuments and cemeteries quickly illustrates the force of *Marsh* in the instant case. As Chief Justice Rehnquist himself pointed out in *Van Orden*:

> The apex of the Washington Monument is inscribed "*Laus Deo*," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two . . . inscriptions [which] include . . . extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the faller sailors as "the year of our Lord 1804. . . ."

Van Orden, 545 U.S. at 689 n.9 (plurality).

Government use of religious symbols as memorials is perhaps most poignantly displayed in this country's national cemeteries. The United States currently maintains over one hundred and twenty-five domestic national cemeteries. Department of Veterans Affairs National Cemeteries, http://www.cem.va.gov/cem/cems/listcem.asp (last visited June 5, 2009). Since the end of World War I—almost ninety years—the government, upon request of the family, has engraved the Latin cross as an emblem of belief on its headstones in its national cemeteries. History of Government Furnished Headstones and Markers, http://www.cem.va.gov/cem/hist/hmhist.asp (last visited June 5, 2009).

A visit to Arlington National Cemetery reveals that the Latin cross is the predominant emblem of belief engraved in the sea of white headstones. Unidentified soldiers who fell in battle are honored by Arlington's Tomb of the Unknown Soldier, which reads, "Here Rests in Honored Glory an American Soldier Known but to God." The Tomb of the Unknowns, Arlington National Cemetery, http://www.arlingtoncemetery.org/descriptions/tous_back.html (last visited June 5, 2009). The United States also maintains twenty-four overseas military cemeteries. American Battle Monuments Commission, http://www.abmc.gov/home.php (last visited June 5, 2009). Virtually all of the overseas military cemeteries are overwhelmingly dominated by a single memorial symbol—rows upon rows of

white, Latin crosses. *See id.* (ABMC Video, "Fields of Honor.").

Chapels mark the centerpiece of many of the overseas cemeteries and are adorned with Bible verses and religious prose. At the chapel at the Flanders Field cemetery near Waregem, Belgium, for instance, the outer wall explicitly notes the builder of the chapel—the United States of America—with an inscription written in English, Flemish, and French. *See* http://www.abmc.gov/cemeteries/cemeteries/ff.php, Flanders Field American Cemetery & Memorial Booklet at 8. Further, the chapel's interior contains an altar bearing the words of the Divinity: "I WILL RANSOM THEM FROM THE POWER OF THE GRAVE. I WILL REDEEM THEM FROM DEATH. (Hosea, XIII:14)" *Id.* at 9. Finally, the ceiling of the chapel is decorated with a mosaic depicting religious themes—"The beauty of the interior [of the chapel] is enhanced by the mosaic ceiling, which depicts a lighted oil lamp under the stars of Heaven with doves of peace flying toward the light . . . ." *Id.* at 10.

The cemetery at Flanders Field is no less remarkable. In addition to placing a Latin cross at every non-Jewish soldier's grave (some of whom almost certainly were not Christians), the government placed a cross at the grave of every *unidentified* soldier, some of whom were likely non-Christians. *See* http://www.abmc.gov/cemeteries/cemeteries/ff.php, Flanders Field American Cemetery & Memorial Booklet at 12 (last visited June 5, 2009). Moreover, each cross marking the unidentified soldiers bears the engraving, "HERE

RESTS IN HONORED GLORY AN AMERICAN SOLDIER KNOWN BUT TO GOD." *See id.* at 15.

The practice at Flanders Field is indicative of a longstanding and permissible tradition of honoring fallen heroes with crosses, simultaneously evincing both a religious and non-religious meaning (*e.g.* their juxtaposition with Stars of David for graves of Jewish soldiers (religious), as well as their use to mark graves of the unknown (non-religious)). This practice corresponds neatly with our nation's interest in maintaining the Cross as a war memorial, and demonstrates the longstanding acceptability of using the cross simultaneously as a symbol of death and as a symbol of religious significance.

Arlington National Cemetery, for its part, contains a number of memorial crosses. For example, Arlington is home to the Argonne Cross Memorial, which is a memorial to the soldiers of the World War I American Expeditionary forces in France,[3] and the Canadian Cross of Sacrifice, which honors U.S. citizens who served in the Canadian forces in the First and Second World Wars and Korean War.[4] There are countless crosses emblazoned on the tombstones of fallen servicemen and women. Other religious symbols adorn memorials as well. Any assumption by the Court that *government* ownership and control of the Cross (as part of a Veterans' memorial) violates the

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[3] *See* http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited June 5, 2009).

[4] *See* http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited June 5, 2009).

Establishment Clause would indeed call into question the constitutionality of these memorials in our nation's cemeteries.[5] These examples demonstrate that this nation has cherished a long and unbroken tradition of using crosses and other religious symbols as memorials to the dead.

Therefore, in light of the authorities above, the Cross would still be valid under *Marsh* even if this Court attributes to the Cross the predominantly religious character that the court below did. *See Buono v. Kempthorne*, 527 F.3d 758, 773, 778 (9th Cir. 2008) (accepting uncritically the holding of the District Court which found that the "Latin Cross [is a] sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." (citation omitted)). As noted above, the historical acceptability and longevity of using religious symbols in general, and crosses in particular, to memorialize fallen heroes means that any analysis considering whether an ongoing Establishment Clause violation exists after the transfer of the land should begin with the recognition that the existence of the Cross on *public* land was constitutional all along. The existence of the Cross, regardless of whether it is on public or private land, will no more endanger the

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[5] This Court may take judicial notice of the official websites and their recorded facts and photographs cited here in Section II.B., because they are issued by a public authority and as such are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). *See also, Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (citing Rule 201(b)).

Establishment Clause than does the Biblical inscription on the Liberty Bell,[6] or the national motto on our coins.

Simply put, any ruling that the Cross, existing as a veterans' memorial, violates the Establishment Clause would be in direct conflict with the intentions of the Framers of the First Amendment and with deeply rooted practices and traditions of this nation. Throughout our nation's history our government has openly recognized religion on its property, especially that property used to commemorate those who have made the ultimate sacrifice. This Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored devotion to the concept of neutrality," *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would deny veterans, their families, and the vast majority of Americans this symbol of remembrance and acknowledgement of the sacrifice made by this Nation's fallen heroes. In fact, any conclusion to the contrary places virtually every religious reference on public land at risk from such "untutored devotion." *Id.* (Goldberg, J., concurring).

As Justice Thomas recently noted concerning the Cross at issue in the instant case, "If a cross in

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[6] The Liberty Bell is inscribed with the following Bible verse, "Proclaim LIBERTY Throughout All the Land Unto All the Inhabitants Thereof (Leviticus, 25:10)." *See* Liberty Bell Center, http://www.nps.gov/inde/liberty-bell-center.htm (last visited June 5, 2009).

the middle of a desert establishes a religion, then no religious observance is safe from challenge." *Van Orden*, 545 U.S. at 694-95 (Thomas, J., concurring). The Constitution recognizes no such "establishment," thereby protecting the Cross from the instant "challenge." *Id.* at 695 (Thomas, J., concurring).

II. THE COURT BELOW ERRED IN APPLYING THE REASONABLE OBSERVER STANDARD BECAUSE THE COURT ATTRIBUTED TO THE OBSERVER ONLY INFORMATION ABOUT THE CROSS WHICH CAST IT IN A NEGATIVE LIGHT AND NOT INFORMATION WHICH CAST IT IN A POSITIVE LIGHT.

The Secretary has also persuasively argued that any reasonable observer would quickly be able to conclude that the government was not endorsing religion, having transferred the Cross to a private owner. (Pet'rs' Br. at 22-23.) Moreover, because a reasonable observer would have knowledge of the long-standing history and traditions discussed above (especially crosses used in cemeteries and at war memorials), the reasonable observer would similarly conclude that no endorsement of religion existed *prior* to the transfer of ownership.

Amicus simply adds one note of context to illustrate the error of the court below in its analysis of the reasonable observer. The court below attributed to a reasonable observer the following:

> [A] reasonable observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately owned land in the Preserve."

Buono, 527 F.3d at 782-83 (citations and quotations omitted).

The court below, however, cannot postulate such an informed reasonable observer without acknowledging that the observer would know one more critical piece of information—namely, that the Cross was the subject of years-long litigation, resulting in an attempt to cure a perceived Establishment Clause violation by *transferring ownership to a private party*. In other words, the reasonable observer contemplated by the court below cannot plausibly have knowledge of "the government's attempts to preserve [the Cross] and the denial of access to other religious symbols" but at the same time lack knowledge that the government no longer owns the land in an attempt to follow a court order. Therefore, when this Court attributes *all* pertinent knowledge to the reasonable observer, the inescapable conclusion remains that the Cross offends no law, and most especially not the Constitution.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioners' and other *Amicus Curiae* Briefs, this Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
this 8th day of June 2009,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 3 -- 2009
OFFICE OF THE CLERK

No. 08-472

IN THE
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY AND THE WESTERN LANDS PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY AND THE WESTERN LANDS PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Public Employees for Environmental Responsibility and the Western Lands Project respectfully submit this brief as *amici curiae* in support of respondent.[1]

INTEREST OF *AMICI CURIAE*

Amici are not-for-profit environmental organizations with a strong interest in keeping public lands, such as the Mojave National Preserve, within control of the federal government. Public Employees for Environmental Responsibility ("PEER") is a national alliance of local, state, and federal resource professionals. PEER's objectives include monitoring natural resource management agencies by serving as a "watch dog" for the public interest. The Western Lands Project monitors federal land exchanges and sales while promoting reform in related federal policies. It scrutinizes the various efforts underway to privatize public lands, with the goal of retaining the public land base.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk.

One issue raised by this case is whether the case became moot because the necessary preconditions for the conveyance of public land to the intended recipient had not been fulfilled before that entity became defunct. The resolution of that question implicates *amici*'s interest in the preservation of public land.

SUMMARY OF ARGUMENT

This case became moot when Post 385E disbanded, an event that transpired while the case was pending in the court of appeals. Because Congress's designated recipient disbanded and no longer stood ready to receive the federal land, there was no case or controversy in the court of appeals, and accordingly no jurisdiction in that court or this one.

Petitioners and their *amici* attempt to rescue this Court's jurisdiction by arguing that Post 385E's successor in interest can stand in the place of Post 385E and receive the federal land. But Congress did not grant the land to Post 385E *and its successors in interest*. And because the statutory conveyance contained unfulfilled conditions precedent—a required appraisal and equalization payment—Post 385E never received vested rights in the land that it could pass to its successor in interest.

An entity purporting to be "VFW Post 385" claims that it has been reconstituted and stands ready to receive the federal land. But that claim cannot cure the fact that the case was moot before the Ninth Circuit issued its decision. And in any event substantial fact-finding and briefing should occur before the lower courts, in the first instance, to determine whether Post 385E has been validly reconstituted as

Post 385 and whether Congress intended to transfer the land to this new entity calling itself Post 385.

ARGUMENT

I. THIS CASE WAS MOOT BEFORE THE COURT OF APPEALS ISSUED ITS DECISION

A. When Post 385E Became Defunct, The Case Became Moot

1. This Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). This obligation "assumes a special importance when," as here, "a constitutional question is presented." *Id.* at 541-42. This Court therefore has an obligation to determine whether the court of appeals had jurisdiction over this case at the time it issued its decision. Should the Court conclude that the court of appeals lacked jurisdiction, its jurisdiction would be limited "to correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936); *see Bender*, 475 U.S. at 541.

One circumstance in which an appellate court lacks jurisdiction is when a case becomes moot on appeal. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983); *see DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (explaining that this jurisdictional limit "derives from . . . Art. III of the Constitution"). A

case becomes moot when the parties no longer have "a 'personal stake in the outcome' of the lawsuit." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983)).

2. This case became moot while it was pending in the Ninth Circuit, depriving that court of jurisdiction over petitioners' appeal. This Court should therefore vacate the lower court's decision as moot.

The facts establishing that the case became moot on appeal are straightforward. Respondent filed suit challenging the government's display of a white cross monument on a parcel of federal land, and the district court issued an injunction against the display. Congress then enacted a statutory provision (section 8121) directing the Secretary of the Interior to transfer the parcel of property on which the cross is displayed to Veterans of Foreign Wars ("VFW") Post 385E in exchange for other land conveyed by a third party (the Sandozes' land). *See* Dep't of Defense Appropriations Act, Pub. L. No. 108-87, § 8121, 117 Stat. 1100 (2003). By the terms of section 8121, that exchange was to occur after an appraisal of the property and an equalization of values through cash payments. *Id.* Before those conditions were performed, the district court enjoined the government from transferring the land.

While the case was pending on appeal, but before the court of appeals issued its decision, Post 385E ceased to exist. *See* Pet. App. 3a-4a; Pet. 1. Because Congress specified Post 385E as the sole recipient of the land containing the cross, and because Post 385E

no longer existed, the land transfer became impossible to consummate.

At that point, the appeal on the validity of the injunction against the transfer of the land to Post 385E became moot. The asserted injury to respondent that gave rise to the present controversy was caused by the threatened land transfer, and that threat had disappeared. And without the possibility of a transfer, neither party had an interest in litigating the validity of the injunction against the transfer. Because the land could not be transferred in any event, respondent no longer had an interest or need for an injunction against the transfer. And because the government could not transfer the land in any event, it no longer had an interest in having the injunction lifted. With no party having a personal stake in the outcome of the appeal, the case became moot. *Lewis*, 494 U.S. at 477.

B. The Transfer Of Post 385E's Property To The California VFW Did Not Keep The Case Alive

1. The government and its *amici* contend that the case remained alive even after Post 385E became defunct, because the California VFW succeeded to all of Post 385E's interest in land, and it stood ready to assume ownership of the public land on which the cross is displayed. Pet. Reply 10; VFW Am. Br. 35-39. But Congress directed the Secretary to convey the property containing the cross only to "Veterans of Foreign Wars Post #385E." Congress did not direct the Secretary to convey the land to Post 385E *and its successors in interest. Cf. Rutherford v.*

Greene's Heirs, 15 U.S. (2 Wheat.) 196, 197 (1817) (explaining that the conveyance stated that land "shall be allotted for, and given to, . . . Greene, his heirs and assigns"). And in government land transfers, "nothing passes by implication." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837).

The government and its *amici* contend that there was no need for a statutory directive to convey the land to Post 385E's successor, because Post 385E had already acquired an interest in the land before it became defunct and that interest automatically passed to the California VFW. But when a condition precedent to a land conveyance has not been fulfilled, there is no vested interest to pass on. And section 8121 imposes two concrete conditions precedent to the transfer of the land containing the cross, neither of which was fulfilled before Post 385E became defunct. Post 385E therefore never acquired an interest in the land containing the cross that it could pass on to the California VFW.

2. Under this Court's cases, a prospective recipient of federal land does not acquire a property right in that land until all conditions precedent to the transfer have been satisfied. When a condition precedent has not been fulfilled, the recipient has only "a promise of a title, . . . an inchoate interest." *Maynard v. Hill*, 125 U.S. 190, 214-15 (1888). This inchoate interest gives the prospective recipient neither title nor any equitable claim to the land; "nothing passe[s]" until all conditions precedent are satisfied. *Hall v. Russell*, 101 U.S. 503, 510 (1879). Only after the conditions have been satisfied does the pro-

spective recipient's "right to a transfer of the legal title from the United States [become] vested." *Id.* And only then can a recipient pass on an interest in the land to a successor. *Maynard*, 125 U.S. at 216.

The Court's cases illustrate that conditions precedent principle. In *Vance v. Burbank*, for example, this Court analyzed a land grant to a settler that, "when perfected, inured to the benefit of himself and his wife in equal parts." 101 U.S. 514, 521 (1879). The wife, however, "got nothing except through her husband." *Id.* Applying the conditions precedent principle discussed above, the Court held that if the husband "abandoned the possession before he became entitled to the grant, [the wife's] estate in the land was gone as well as his." *Id.*

Similarly, in *Maynard*, a wife divorced her husband before the fulfillment of the conditions precedent to a land transfer to her husband. The Court rejected the wife's claim that she had acquired her husband's interest in the land, explaining that the husband had not acquired a vested interest before the divorce and that a "divorce ends all rights not previously vested." 125 U.S. at 216.

Under those condition precedent cases, Post 385E never acquired a vested interest in the land on which the cross is displayed, and its successor therefore did not acquire such an interest when Post 385E ceased to exist. Section 8121 imposed two conditions precedent to the transfer of the land containing the cross to Post 385E: (i) an appraisal of both the federal land and the Sandozes' land, and (ii) the equalization of values through an exchange of cash pay-

ments. Neither condition was fulfilled before Post 385E became defunct.

3. The question whether Congress has created a condition precedent in a land grant turns on "the proper construction to be placed on the language employed." *Loud v. Pomona Land & Water Co.*, 153 U.S. 564, 576 (1894). In resolving that issue, courts look to whether the parties intended a required condition to be satisfied "before" the execution of the transfer. *Id.*; *see also* Lawrence P. Simpson, *Handbook of the Law of Contracts* § 152 (1965) (explaining that "[i]n bilateral contracts . . . where one party's performance is to be rendered prior in time to that of the other, it is a constructive condition precedent to the latter's duty"). Section 8121 evinces Congress's intent to defer the land transfer until after the completion of a land appraisal process and a cash equalization payment, making them conditions precedent.

a. The text of section 8121 makes that clear. Section 8121 provides that "[i]n exchange for [the Sandozes' land], the Secretary of the Interior *shall convey*" the property to Post 385E. *See* § 8121(a) (emphasis added). Congress' use of the phrase "shall convey" demonstrates its intent that the exchange happen at a future time, not instantaneously upon passage of the statute. *See* William Strunk Jr. & E.B. White, *The Elements of Style* 58 (4th ed. 1999) (explaining that the use of "shall" followed by a verb converts it to the future tense). Elsewhere, section 8121 refers to the properties "to be exchanged." § 8121(c). The use of the future tense "to be exchanged" reinforces the conclusion that Congress intended a future exchange, rather than an immediate one.

By employing the future tense, Congress departed from the language it routinely employs when it conveys land immediately without conditions precedent. In those cases, it directs that land "hereby[] is granted." *United States v. S. Pac. R. Co.*, 146 U.S. 570, 571 (1892) (quoting 14 Stat. 292). Unlike the "shall convey" and "to be exchanged" language that appears in section 8121, the words "hereby granted" "import a transfer of a present title, not a promise to transfer one in the future." *Id.* at 593.

Congress's use of the "shall convey" and "to be exchanged" language necessarily informs the meaning of the provisions in section 8121 mandating that (i) "the values of the properties shall be determined through an appraisal" and (ii) the "values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d)." § 8121(c). In particular, the "shall convey" and "to be exchanged" language shows that appraisal and equalization are conditions precedent. If the appraisal and equalization were not conditions precedent, there would have been no point in Congress specifying a future exchange; it could have "hereby granted" the federal land in exchange for the Sandozes' property.

Petitioners' *amici* do not come to grips with the "shall convey" and "to be exchanged" language in section 8121. Instead, they rely on cases that use the "hereby is granted" language that immediately vests rights in the recipient. *See* VFW Am. Br. 37; *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 248 (1891) (noting that this phrase has "always received the same construction, that, unless the terms are re-

stricted by other clauses, . . . carry[] at once the interest of the grant or in the lands described"); *Leavenworth, L. & G. R.R. v. United States*, 92 U.S. 733, 735 (1875) (describing those words as "words of absolute donation" importing "a grant *in praesenti*"); *Schulenberg v. Harriman*, 88 U.S. (21 Wall.) 44, 60 (1874) (observing that this phrase "imports a present grant and admits of no other meaning").

b. In requiring appraisal and equalization as conditions precedent to the exchange, Congress acted consistently with the statute that governs federal land grants generally. The Federal Land Policy Management Act (FLPMA) establishes the usual practices for the Secretary of Interior's transfer of public land in exchange for non-federal land. *See* Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. § 1701 *et. seq.*). Like section 8121, FLPMA requires the "values of the lands exchanged" to be "equal, or . . . equalized by the payment of money," 43 U.S.C. § 1716(b), and specifies that the parties conduct an appraisal of the relevant land to serve as the basis for the equalization payment, *id.* § 1716(d).

The text of FLPMA indicates that appraisal and equalization are conditions precedent to the exchange of land. Specifically, FLPMA provides that either party may respond to an unexpected appraisal by withdrawing from or modifying the exchange. *Id.* § 1716(d)(3). Consistent with that provision, the Secretary has promulgated a regulation explaining that neither party to an exchange acquires a legal right to the land prior to the execution of a "legally binding exchange agreement" that identifies the

amount of an agreed-upon cash equalization payment. 43 C.F.R. § 2201.7-2(c).

FLPMA appears to apply to the conveyance at issue here. By its terms, FLPMA governs "exchange[s] pursuant to this Act *or other applicable law*." 43 U.S.C. § 1716(e) (emphasis added). Accordingly, the Department of the Interior has construed FLPMA's provisions to "apply to all land exchanges, made under the authority of the Secretary, involving Federal lands." 43 C.F.R. § 2200.0-7(b). Section 8121 would appear to be "other applicable law," and any transfer of land under section 8121 would appear to be "under the authority of the Secretary." If so, FLPMA would govern the exchange and impose appraisal and equalization as conditions precedent.

FLPMA would also appear to govern the exchange for another reason. Section 8121 is codified at 16 U.S.C. § 410aaa-56, along with other provisions governing the Mojave National Preserve. These provisions direct the Secretary to "administer the preserve in accordance with . . . the provisions of law generally applicable to units of the National Park System." 16 U.S.C. § 410aaa-46. Since FLPMA generally applies to exchanges of land within that system, it would appear to govern any exchange of Mojave lands.

Even if FLPMA did not directly govern this exchange, its imposition of appraisal and equalization as conditions precedent would still be significant. Under well-established principles of statutory construction this Court should construe the specific conveyance in section 8121 consistently with the general principles of FLPMA. *See* 2B Norman J. Singer,

Sutherland Statutes and Statutory Construction § 51.02 (6th ed. 2000) ("Prior statutes relating to the same subject matter are compared with the new provision; if it is possible by reasonable construction, both are construed so that effect is given to every provision in all of them.").

c. Treating appraisal and equalization as conditions precedent is not only compelled by the text of section 8121 and FLPMA; it is necessary to further important government interests. First, by making an appraisal and equalization conditions precedent, Congress protected the government against an improvident exchange. For example, if the appraisal in this case were to reveal lucrative mineral deposits on the Sandozes' land, the government might be forced to pay the Sandozes millions of dollars after the fact. By making appraisal and equalization conditions precedent to land exchanges, Congress ensured that the government would not be locked into a financially troubling land exchange. *See* 43 U.S.C. § 1716(d)(3). Instead, after such an appraisal, the government may simply back out of the deal. *Id.*

Second, by making appraisal and equalization conditions precedent, Congress ensured that it would get fair value for its land. If the government were to immediately grant its land to a private party, a private party that owes an equalization payment might abscond without paying, forcing the government to resort to expensive and uncertain legal procedures. By making equalization a condition precedent, Congress guarded against that danger.

d. In construing Congressional land grants, this Court applies the "familiar rule" that "every public

grant of property . . . if ambiguous, is to be construed against the grantee and in favor of the public." *Cent. Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 49 (1891); *see* 3 Singer, *Statutory Construction* § 64:7 (6th ed. 2000) ("As a general rule, where the language of a public land grant is subject to reasonable doubt, ambiguities are resolved strictly against the grantee and in favor of the government."). Here, the text of section 8121 establishes that appraisal and equalization are conditions precedent. But if the text were ambiguous, that ambiguity would have to be resolved in favor of the public. And since, as discussed above, interpreting appraisal and equalization as conditions precedent would serve the public interest, that interpretation would be required.

The rule that ambiguities in grants are resolved in favor of the public has an ancient pedigree in English law. *See The Rebeckah*, 1 C. Rob. 227, 230 (1799) (explaining that the Crown and the public's rights should not be "diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away"). This Court has applied the presumption throughout its history. *See, e.g.*, *Caldwell v. United States*, 250 U.S. 14, 20-22 (1919) (applying the rule that in statutory grants, "nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the Government"); *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288, 325-26 (1894) (stating that if a grant of land "admit[s] of different meanings, – one of extension, and one of limitation, – [the grant] must be accepted in a sense favorable to the grantor"). And the Court continues to apply the rule in modern cases. *See, e.g.*, *California ex rel. State*

Lands Commission v. United States, 457 U.S. 273, 287-88 (1982) (reading the Submerged Lands Act in a manner that "adheres to the principle that federal grants are to be construed strictly in favor of the United States"); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1960) ("all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included").

This longstanding interpretive rule forms the backdrop against which Congress enacts statutory land grants, including section 8121. It also makes sense. If a court construes a conveyance strictly, in favor of keeping federal lands public, it simply returns control of the disputed land to Congress. If the court has misunderstood Congress's intent and the legislature wishes to convey the land to a private party, it can enact a new conveyance doing so explicitly. In contrast, if a court construes a conveyance liberally and allows federal land to leave public control, Congress will face significant barriers in recouping it from private hands. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").[2]

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[2] This interpretive rule applies whether the government receives consideration for the conveyance or not. *See, e.g.*, *Wis. Cent. R.R. Co. v. United States*, 164 U.S. 190, 202 (1896); *S. Pac. Co. v. United States*, 307 U.S. 393, 401 (1939). The rule likewise applies even if the executive branch argues in court that a conveyance of land should be read liberally, because the rule protects Congress's control of public lands. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 520 F.3d 822, 832 (7th Cir. 2008).

Thus, the relevant considerations uniformly establish that appraisal and equalization are conditions precedent to the transfer of public land to Post 385E. Since those conditions were not fulfilled, Post 385E never acquired a vested interest in the land that it could pass on.

4. In response, the government asserts that a party's consideration cannot be a condition precedent. *See* Pet. Reply 11. Appraisal of the land, however, is not a form of consideration; it is simply a condition of the exchange. More fundamentally, one party's payment of consideration may, and often does, constitute a condition precedent to the other side's duty to perform. For example, in *Loud*, the Court expressly held that "*[t]he consideration* to be paid covered both the lands and the stocks, and its payment *was a condition precedent* to a transfer of either or both." 153 U.S. at 580 (emphasis added). And a leading treatise on contracts explains that "[i]n bilateral contracts . . . where one party's performance is to be rendered prior in time to that of the other, it is a constructive condition precedent to the latter's duty." Simpson, *Handbook of the Law of Contracts* § 152.

The authorities on which the government relies, *see* Pet. Reply at 11, do not suggest otherwise. They all address a distinctive doctrine concerning when a promise should be interpreted to be gratuitous. They have nothing to do with the question whether consideration can be a condition precedent to an exchange of land.

The government also argues that even if conditions precedent remained unfulfilled when Post

358E became defunct, the Court's jurisdiction is not affected because "it is the injunction here that blocked the transaction from occurring sooner." Pet. Reply 11, n.9. As authority for that proposition, the government cites a contracts treatise noting that parties to a contract "cannot benefit from preventing other parties from performing conditions precedent." *Id.* (citing 13 Richard A. Lord, Williston on Contracts § 39:3 (4th ed. 2000)). The government's reliance on the doctrine of prevention is misplaced.

First, that doctrine only applies to the conduct of the parties to a contract. As the treatise on which the government relies explains, "[i]t is a general principle of contract law that if one *party to a contract* hinders, prevents, or makes impossible performance by the other party, the latter's failure to perform will be excused." 13 Williston on Contracts § 39:3, at 516 (emphasis added). This Court's cases reflect that settled understanding of the prevention doctrine. *See Anvil Mining. Co. v. Humble*, 153 U.S. 540, 552 (1894); *Union Mut. Ins. Co. v. Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871). Even if the statutory "exchange" in section 8121 is treated as a contract, neither respondent nor the lower courts in this case are parties to that contract. Accordingly, their actions do not implicate the prevention doctrine.

More fundamentally, the underlying rationale of the prevention doctrine is that "one should not be able to take advantage of his or her own wrongful act." 13 Williston, *supra*, § 39:6, at 527. That doctrine therefore applies only against "a party who . . . has violated conscience, or good faith, or other equitable principle, in his prior conduct." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245

(1933). By filing a suit to vindicate a constitutional right, respondent obviously was not engaged in a wrongful act that violated conscience or good faith. The prevention doctrine therefore has no application here.

C. The Alleged Revival Of Post 385E Does Not Change The Fact That The Court of Appeals Lacked Jurisdiction

An organization calling itself "Veterans of Foreign Wars of the United States Post 385" has joined an *amicus* brief arguing that the emergence of a new VFW Post 385 cures the mootness problem. The brief represents that "Post 385 is now fully operational" and "stand[s] ready to receive its property interest." *See* VFW Am. Br. 39. But the claim that Post 385 has suddenly re-emerged two years after it became defunct does not change the fact that the case was moot when the Ninth Circuit issued its decision. The judgment that is presently before the Court was therefore issued by a court without jurisdiction. And this Court has no jurisdiction to do anything other than to vacate the court of appeals' judgment on jurisdictional grounds.

That would leave it to the parties to decide in the first instance whether the claimed emergence of Post 385 raises a new live controversy. The government would have to decide whether Post 385 is a valid legal entity. And it would also have to decide whether the purported new Post 385 is the organization designated in section 8121 to which Congress intended to convey the property. In making that determination, the government would have to take into ac-

count that section 8121 specifies a land grant to "Post 385E," not "Post 385." *See* § 8121; VFW Am. Br. 39.

If the government concluded that a transfer of the land to Post 385 was warranted, respondent would then have to decide whether to seek an injunction against the transfer. And if respondent sought such an injunction, the district court would be required to resolve that issue anew, taking into account developments in the facts and the law that have occurred since its original decision. And since the court of appeals' judgment would have been vacated by this court, the district court's decision would not be constrained by that judgment.

At the very least, because the asserted reemergence of Post 385 creates new factual issues on which no findings have been made and new legal issues that have never been briefed, this Court should not resolve the significance of Post 385's claimed reemergence in the first instance. At a minimum, these new factual and legal issues should be considered first by the lower courts.

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be vacated on mootness grounds.

Respectfully submitted,

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August 3, 2009

AMICUS CURIAE BRIEF

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(12)

No. 08-472

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE THOMAS MORE LAW CENTER, REAR ADMIRAL JEREMIAH DENTON, USN (RET.), ROBERT MARTINO, SYBIL MARTINO, JULIE BLOOMFIELD, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE* IN THIS CASE[1]

THOMAS MORE LAW CENTER is a national, nonprofit public interest law firm based in Ann Arbor, Michigan. It is dedicated to defending and promoting America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities. Because this case involves an issue of law that impacts America's Christian heritage, its resolution is a matter of significant interest to the Thomas More Law Center.

INDIVIDUAL RIGHTS FOUNDATION ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and nonpartisan organization. The IRF is dedicated to supporting litigation involving civil rights, and protection of speech and associational rights, and it participates in educating the public about the importance of First Amendment rights and the Fourteenth Amendment's guarantee of equal protection of the law. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving significant First Amendment and Equal Protection issues. The IRF opposes attempts from anywhere along the political

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

spectrum to undermine equality of rights, or speech or associational rights, which are fundamental components of individual rights in a free and diverse society.

JEREMIAH A. DENTON is a retired U.S. Navy Rear Admiral, a veteran of World War II, Korea, and Vietnam, a former prisoner of war ("POW") from July 18, 1965 to February 13, 1973, and a former U.S. Senator from the State of Alabama.

Admiral Denton first came to the attention of the American public during a television interview arranged by his North Vietnamese captors in 1966. Expected to give "proper responses" to a journalist's recitation of alleged American war atrocities, Admiral Denton affirmed his faith in his government's position, stating, "I will support it as long as I live." While responding to questions from his interrogator, Admiral Denton blinked his eyes in Morse Code, repeatedly spelling out the covert message "TORTURE." His message was the first confirmation that American POWs were being mistreated.

During his nearly eight years as a POW, Admiral Denton was subjected to severe torture. He became the first American military captive to be subjected to four years of solitary confinement. Admiral Denton's extraordinary account of his endurance and sacrifice for our country while imprisoned in North Vietnam was told in his 1976 book, *When Hell Was in Session*.

After his release in 1973, Admiral Denton continued his military career, ultimately achieving the rank of Rear Admiral. Upon retirement from the Navy, Admiral Denton was elected to the U.S. Senate,

becoming the first Republican ever elected by the popular vote to represent Alabama.

In 2008, Admiral Denton's incredible sacrifice for our country—a horrific sacrifice that is unimaginable to most Americans, including most war veterans—was honored and memorialized at the Mt. Soledad Veterans Memorial in San Diego, California.[2] A plaque in his honor was placed at the veterans' memorial during a ceremony held on September 19, 2008, the 2008 National POW/MIA Recognition Day. *See* App. 1a.

In 1973, during the well-televised arrival of the American POWs at Clark Air Force Base in the Philippines, Admiral Denton, a senior officer aboard the aircraft, was asked just a short time before landing to say a few words to the welcoming crowd that had gathered. His words, which were recounted by his son during the plaque-dedication ceremony at the Mt.

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[2] The Mt. Soledad Veterans Memorial contains a large cross, which has been the subject of much litigation since 1989. *See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S.Ct. 2856, 2858 (2006); *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (*en banc*); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993); *Paulson v. Abdelnour*, 145 Cal.App.4th 400, 433 (Cal. Ct. App. 2006); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991). Presently, the Ninth Circuit is considering a new constitutional challenge to the memorial cross in *Jewish War Veterans v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56415 (9th Cir. Aug. 27, 2008) and *Steven Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56436 (9th Cir. Sept. 3, 2008). The outcome of this present case will likely have a significant impact on the question of whether the Mt. Soledad Veterans Memorial will remain intact.

Soledad Veterans Memorial, stirred great emotion among those in attendance at the 2008 ceremony just as they did in 1973. Admiral Denton stated, "We are honored to have had the opportunity to serve our country under difficult circumstances. We are profoundly grateful to our Commander-In-Chief and to our Nation for this day. God Bless America."

SYBIL and ROBERT MARTINO are the parents of then Captain Michael D. Martino, USMC,[3] and JULIE BLOOMFIELD is the wife of Major Gerald M. Bloomfield, II, USMC. Both Captain Martino and Major Bloomfield were Marine pilots who flew the AH-1 W Super Cobra attack helicopter. On November 2, 2005, while flying in support of security operations near Ar Ramadi, Iraq as part of Operation Iraqi Freedom, their helicopter was shot down by a surface-to-air missile. Both Marines were killed.

In May 2006, after returning from deployment in Iraq, Captain Martino's and Major Bloomfield's Camp Pendleton squadron sponsored a plaque-dedication ceremony at the Mt. Soledad Veterans Memorial to commemorate the fallen Marines' heroic service and to provide a place to honor them. *See* App. 3a, 4a. Over three hundred Marines stood in line in the hot sun for over three hours to meet the Martino and Bloomfield families and to pay respect for their fallen comrades. *See* App. 5a. The emotions felt by the families and the Marines present at this ceremony are inexplicable. The dedication of those plaques at the foot of the memorial cross overlooking the country that these

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[3] Captain Martino was posthumously promoted to Major. *See* App. 2a.

Marines fought and died to protect provided comfort, solace, and closure for the Marines and the grieving families.

The Martino and Bloomfield families, like so many other families during time of war, have sacrificed much for our country, giving their most precious gifts—their sons, brothers, and husbands. *See* App. 6a-9a. The families were most heartened in those somber days after the squadron returned home from Iraq without their loved ones to know that their memories were preserved under the cross at Mt. Soledad. To strip this symbol from war memorials as Respondent desires here would uselessly, needlessly, and painfully desecrate these memories.

In the final analysis, whatever "harm" that Respondent will "feel" if a war memorial containing a cross remains intact pales in comparison to the real and lasting harm that dismantling such memorials will have to the families and to the sacrifices and memories of those heroes—living and dead—who are honored by them. Admiral Denton, Sybil Martino, Robert Martino, and Julie Bloomfield *will* be irreparably harmed should the government be forced to purge all war memorials of religious symbols such as a cross.

INTRODUCTION

The purpose of this brief is to provide a voice in this Court that is not often heard. It is the voice of those who will be truly harmed in a *real* way by the destruction of war memorials simply because they contain religious symbols that have long been a part of our Nation's religious heritage.

For most *reasonable* American citizens, and particularly those who have sacrificed so much and whose sons, daughters, husbands, and wives have died defending our country, specifically including *Amici Curiae*, veterans' memorials, including those with religious symbols, provide a lasting tribute to our servicemen and servicewomen. They do not "establish" Christianity as a national religion, as Respondent contends.

From time immemorial, crosses have been used to memorialize fallen war veterans. A cross in the context of a war memorial has an undeniable historical meaning of self-sacrifice—in particular, of making the ultimate sacrifice for one's country.

War memorials provide a place where family members, friends, and comrades of our war veterans can pay tribute to their heroes' sacrifices. It is fitting that a memorial, which provides much comfort, peace, and solace for those who have sacrificed during time of war, contains a cross—a universal symbol of sacrifice. It would desecrate the memories of these war heroes to dismantle historic memorials simply because they contain a cross. Accordingly, *Amici Curiae* urge this Court to reverse the Ninth Circuit, uphold the display of the cross, and to preserve this and other such veterans' memorials for future generations.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT TOLERATE DECISIONS THAT DISFAVOR RELIGION.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated, without equivocation:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.* Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion *in general*.") (emphasis added).

Opponents of religious symbols disingenuously suggest that they merely desire neutrality. In reality, however, they often seek to use the Establishment Clause as a blunt instrument against all things

religious or related to religion in any way, including crosses used as part of national war memorials. This Court should reject such harmful and divisive claims, which seek to bring "us into war with our national traditions."

Unfortunately, accepting Respondent's distorted view of the law would pave the road for removing all religious imagery or references from official recognition. Banned from public use would be the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity), "In God We Trust" on our coinage, religious stamps the U.S. Postal Service issues at Christmas and Easter, the many white crosses marking the grave sites of our Nation's fallen veterans buried at national cemeteries, the numerous war memorials containing crosses, and even the names of our cities, such as Los Angeles, San Francisco, and Corpus Christi, and all official signs and symbols on which these names appear. The pernicious effect of Respondent's argument is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

Contrary to Respondent's claims, throughout its decisions, this Court has consistently described the Establishment Clause as forbidding decisions that tend to "disapprove," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"); *Lynch*, 465 U.S. at 673

("hostility"); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (noting that our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general"); *Board of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring) ("The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools."). Respondent's argument, therefore, is the antithesis of religious tolerance required by our Constitution.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), for example, a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, this Court rejected arguments advanced by Respondent in this case. Most significantly, Justice Breyer, in his concurring opinion, which provided the narrowest grounds for the decision, stated,

> [The removal of the religious symbol], based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based

> divisiveness that the Establishment Clause seeks to avoid.

Id. at 704.

Here, Respondent seeks to foment "religiously based divisiveness" contrary to the neutrality and accommodation principles required by our Constitution.

Fortunately, the significance of the *Van Orden* decision has not gone unnoticed by the lower federal courts. For example, in *ACLU v. Mercer County,* 432 F.3d 624 (6th Cir. 2005), a recent Sixth Circuit case upholding the public display of the Ten Commandments in light of the *Van Orden* decision, the court stated, "Our concern is that of the reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Id.* at 638 (quoting ACLU website).

The Sixth Circuit stated further:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted).

In addition to the Sixth Circuit, other federal courts, including the Ninth Circuit, have decided cases in favor of the public display of religious symbols following *Van Orden*. *See, e.g., Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU v. Plattsmouth*, 419 F.3d 772 (7th Cir. 2005) (*en banc*); *ACLU v. Board of Comm'r of Lucas County*, 444 F. Supp. 2d 805, 815 (N.D. Ohio 2006) (making the following, pertinent observation, "Since *Van Orden*, federal courts have uniformly permitted public displays of Ten Commandments monuments"); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D. N.D. 2005); *Russelburg v. Gibson County*, No. 3:03-CV-149, 2005 WL 2175527 (S.D. Ind. Sept. 7, 2005).

Respondent also desires this Court to accept the shopworn and demonstrably false claim that the public display of a cross is *per se* unconstitutional and therefore anything the government does short of destroying or removing it is unconstitutional. This argument was recently rejected by the Tenth Circuit in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), a case in which the court upheld against an Establishment Clause challenge the display of various Latin crosses on public property. In doing so, the court noted that it would be "folly" to adopt the rule that Respondent proposes here. *Id.* at 1022; *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding the public display of a Latin cross); (*see also* photographs of crosses on gravesites at Arlington National Cemetery at App. 10a-12a).

As the California appellate court aptly explained in a case addressing the Mt. Soledad Veterans Memorial:

> [T]here is no argument presented or any authority cited to us standing for the proposition that the City may transfer the Mount Soledad site only if the cross is removed. We would have serious concerns respecting the prohibition of hostility to religion embedded in article I, section 4 of our Constitution and the federal establishment clause if, prior to otherwise divesting itself of land on which religious artifacts or icons rest, a government entity were required to remove or destroy them.

Paulson, 145 Cal. App. 4th at 420.

While it is true that a cross is a religious symbol, it is also true that it is a symbol that conveys the unmistakable secular message of suffering and ultimate sacrifice. This is particularly true in the context of a veterans' memorial. Thus, it is proper and accurate to describe such memorials as secular veterans' memorials, particularly in light of the history of such memorials.

Finally, Respondent and others who oppose the display of religious symbols in the public square would have this Court completely ignore the interests of *Amici Curiae* and the countless other family members, friends, and comrades of our veterans who will be greatly harmed should this court adopt Respondent's erroneous and divisive view of our Constitution. It would be a mistake for this Court to do so. Indeed, *Amici Curiae* strongly urge this Court to consider the attached photograph of Mrs. Martino hugging the

casket of her son at the conclusion of the funeral service held on *federal* land by *federal* officials at Arlington National Cemetery. *See* App. 6a; *see also* App. 13a-15a. The memory of her son is now preserved at the Mt. Soledad Veterans Memorial—a memory that this and other litigants seek to callously destroy by invoking, of all things, the First Amendment.

In the final analysis, gone are the days of the ill-conceived threats to tear down our Nation's history and religious heritage based on a tortured view of the Establishment Clause. This Court should reject this most recent effort by affirming the permissible use of religious symbols in our Nation's memorials.

II. THE FIRST AMENDMENT PERMITS ACKNOWLEDGMENT OF RELIGION, BUT FORBIDS HOSTILITY TOWARD ANY.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. *Van Orden*, 545 U.S. at 685-86 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, "In God We Trust," the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 545 U.S. at 677; *see*

also Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, this Court concluded its recitation of examples of government recognition of religion by stating,

> One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78.

As recently noted by this Court, "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden*, 545 U.S. at 687 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36 (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious

refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

The use of religious symbols has long been a part of government and remains so today. *See, e.g., Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Attempts to suppress this recognition and historical acknowledgment—as illustrated by Respondent's arguments in this case—are the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

Thus, while the use of religious symbols is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, decisions that are hostile toward religion—such as the one pressed for by Respondent here—do not enjoy such a favorable history. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "forbids hostility toward any" religion) (internal punctuation, quotations, and citations omitted); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (acknowledging "that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general").

Accordingly, a reasonable observer would know that while the cross is a religious symbol, it is also a universal symbol of self-sacrifice—and in the context of a war veterans' memorial, the cross is a symbol of the ultimate sacrifice made for one's country. The reasonable observer would know that crosses are frequently used to memorialize fallen warriors, and not only on individual graves. For example, large memorial crosses are displayed on federal property at Arlington National Cemetery (the Argonne Memorial and Canadian Cross of Sacrifice) and Gettysburg National Military Park (Irish Brigade Monument), and municipal property at the Taos Plaza (a cross memorializing soldiers of the Bataan Death March of World War II).

A reasonable observer would know that, historically, the cross has been used as a generic grave marker for fallen soldiers, even when the religious beliefs of the individual honored by the cross were unknown. For example, it is commonly known that there are thousands of crosses marking the gravesites of fallen United States soldiers at places such as Flanders Field in the Netherlands (World War I) and Normandy, France (World War II). The striking image of a sea of white crosses conveys the powerful, secular message of ultimate sacrifice, not simply Christianity. Thus, a reasonable observer would conclude that this memorial is not about religion; it is about remembering our veterans who have sacrificed for this country. It is about a national veterans' memorial that stands as a symbol of patriotism.

In the final analysis, a memorial cross does not convey an impermissible message of endorsement of religion to an informed, reasonable observer. Rather,

such memorials convey an unmistakably American message of patriotism and self-sacrifice. To dismantle this or any other historic memorial simply because it contains a cross would desecrate the memories and the sacrifices of our war veterans and cause incalculable harm to these veterans and their families, friends, and comrades. Thus, this Court should reject Respondent's misguided efforts to destroy a national landmark and treasure based on a flawed view of the Constitution. Accepting Respondent's view will cause real and palpable harm.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision and affirm the longstanding use of crosses and other religious symbols as part of our Nation's memorials.

Respectfully submitted,

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APPENDIX

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Michael D. "Martini" Martino

Captain
U. S. Marine Corps
Southwest Asia
Operation Iraqi Freedom
Killed in Action 2 Nov 2005

Naval Aviator

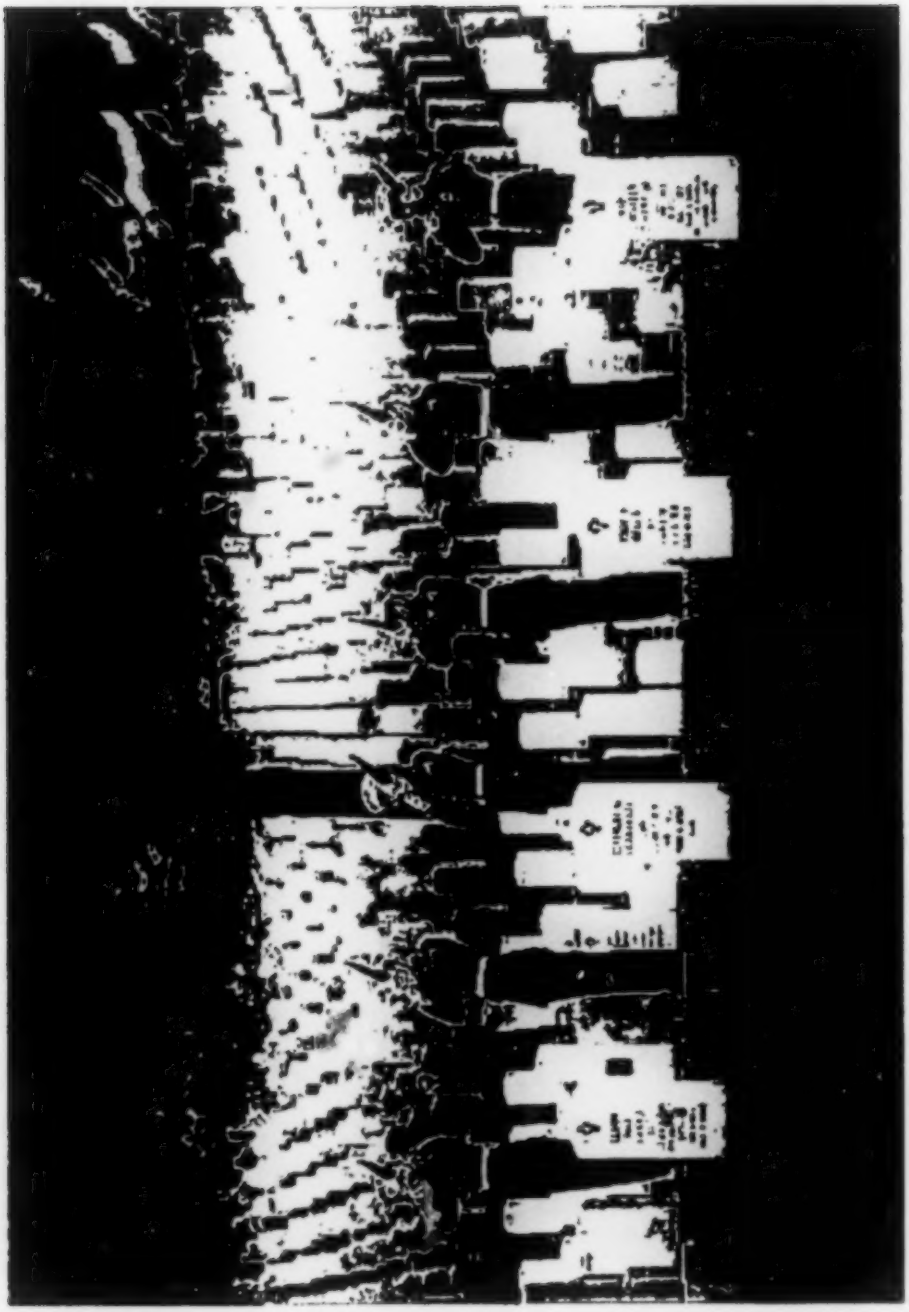
MEDALS/RIBBONS: Purple Heart, Air Medal - Individual w/Combat "V" and 1 Strike/Flight Award, Commendation w/Combat "V", Combat Action, Unit Commendation w/1 Star, Meritorious Unit Commendation, National Defense Service w/1 Star, Iraq Campaign, Global War on Terrorism Expeditionary and Service, Sea Service Deployment w/1 Star

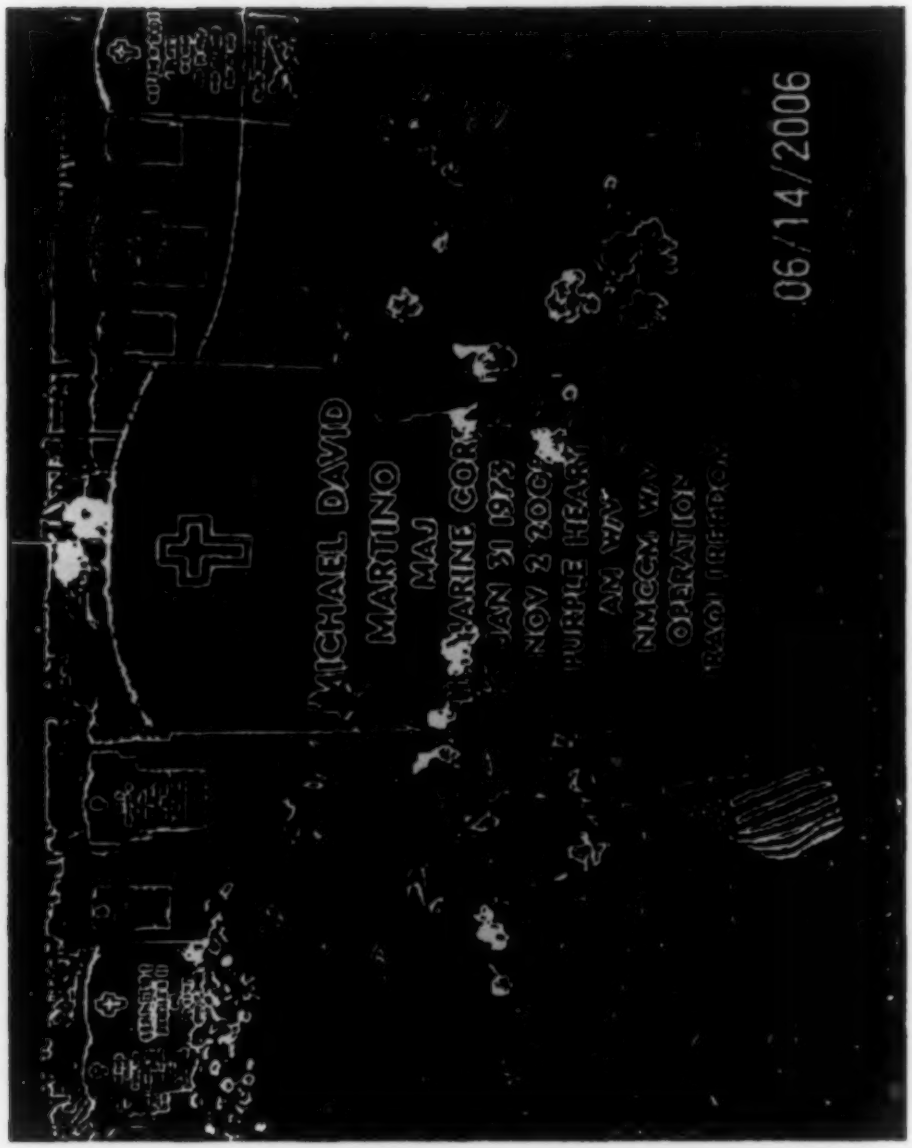
On his second Iraq tour, "Martini" made the ultimate sacrifice in support of security and stabilization operations flying "Gunslinger 00" in the Al Anbar Province.

Posthumously promoted to Major

Semper Fi
With pride and love, you are missed

7a

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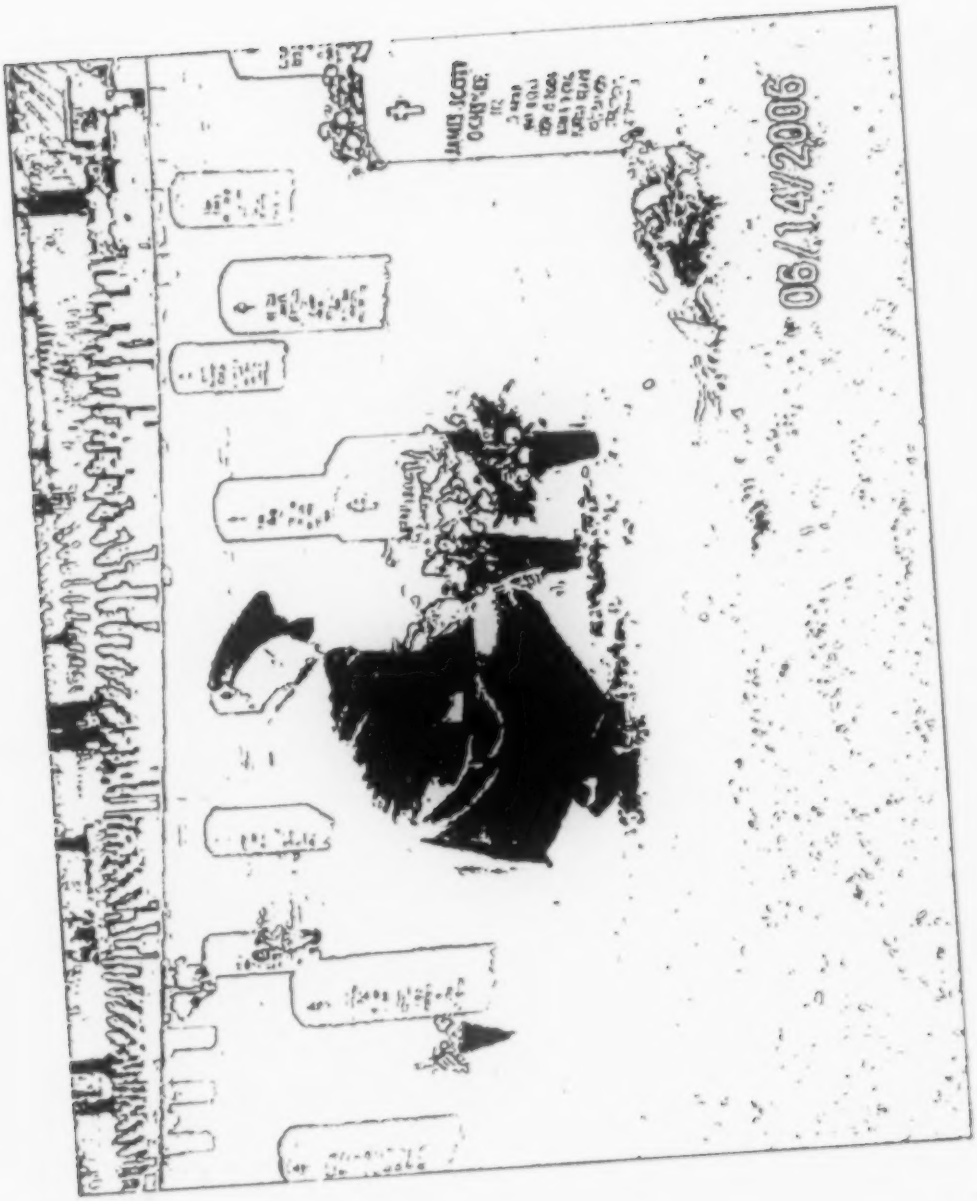
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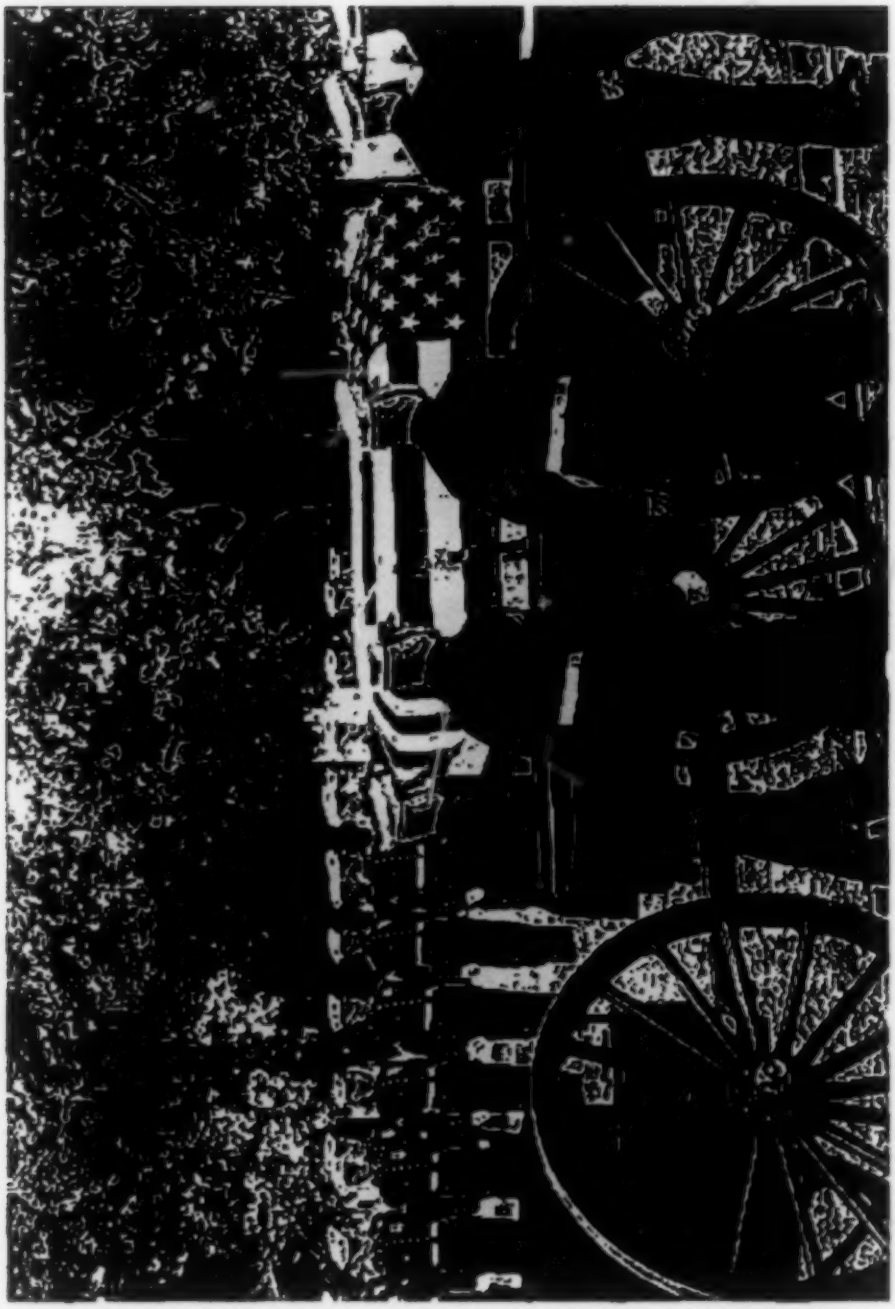

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR
ET AL, PETITIONERS

v.

FRANK BUONO, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UTAH HIGHWAY PATROL ASSOCIATION AND ROBERT E. MACKEY AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross in a remote area within what is now a federal preserve as a memorial to fallen service members. After the district court held that the presence of the cross on federal land violated the Establishment Clause and permanently enjoined the government from permitting its display, Congress enacted legislation directing the Secretary of the Interior to transfer an acre of land including the cross to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, and the court of appeals affirmed. The questions presented are:

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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In the Supreme Court of the United States

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BRIEF FOR THE UTAH HIGHWAY PATROL ASSOCIATION AND ROBERT E. MACKEY AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE[1]

Robert E. Mackey – Robert Mackey organized the 1995 initiative to place fourteen granite crosses on Storm King Mountain, located in the White River National Forest. The crosses memorialize the death and sacrifice of Mr. Mackey's son, Donald Mackey,

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

and thirteen other firefighters who lost their lives while fighting the South Canyon Fire near Glenwood Springs, Colorado on July 5, 1994. The crosses were erected with the permission of each firefighter's family and the Bureau of Land Management. In the more than thirteen years since the granite memorial crosses were installed, Mr. Mackey and many others have visited the crosses to pay respect to the firefighters who gave their lives fighting the South Canyon fire. The proper resolution of this case is of great concern to Mr. Mackey because the Ninth Circuit's blanket prohibition of Latin crosses on federal land may call into question the existence of the firefighter memorial crosses on Storm King Mountain and other similar memorials around the country located on state and federal land.

Utah Highway Patrol Association ("UHPA") – UHPA is a private non-profit organization dedicated to supporting Utah State Highway Patrol Officers and acknowledging those troopers' service to the people of the State of Utah. UHPA conceived and constructed memorial crosses along Utah roadways at or near the location where thirteen highway patrol officers were mortally injured in the line of duty. No governmental or religious entities were involved in the process. The crosses were erected with the permission of each patrol officer's family and the State of Utah. American Atheists, Inc. and several individual members of that organization brought suit in the United States District Court for the District of Utah against several Utah state officials for permitting the erection of the crosses, alleging violations of the Establishment Clause, the Free Speech Clause, and the Utah Constitution.

UHPA intervened in the action. The district court granted the defendants' motion for summary judgment. See *American Atheists, Inc.* v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007). American Atheists appealed the decision to the United States Court of Appeals for the Tenth Circuit. That case is still pending. The proper resolution of this case is of great concern to UHPA because if successful, Appellants' efforts could call into question the existence of the highway patrol officers' memorial crosses and other similar memorials around the country located on state and federal land.

ARGUMENT

I. RESPONDENT LACKS CONSTITUTIONAL STANDING TO CHALLENGE THE SUNRISE ROCK CROSS.

The cross in this case sits atop Sunrise Rock in the Mojave National Preserve in southeastern California. *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1204-05 (C.D. Cal. 2002). Erected in 1934 to commemorate individuals who died in World War I, the Sunrise Rock memorial takes the form of a Latin cross, variously described as five to eight-foot tall. *Buono* v. *Kempthorne*, 527 F.3d 758, 760-61 & n.2 (9th Cir. 2008) ("*Buono IV*"). Respondent challenged the Sunrise Rock cross under the Establishment Clause, U.S. Const. Amend. I, not because he "find[s] the cross, itself, offensive," J.A. 85, but because the property "is not open to groups and individuals to erect other freestanding, permanent displays," J.A. 50, including "signs or symbols that express their views or beliefs." J.A. 64.

If his claimed injury is merely that he strongly objects to the memorial on federal land because he believes it violates the Establishment Clause, Respondent would clearly lack standing under *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the court made clear that personal injury based on "the psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing. 454 U.S. at 485.

Combining that purely psychological injury with a concern that Sunrise Rock is not open to other groups or individuals to place signs and symbols that express their views or beliefs, which is not required by the Free Speech Clause, see *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), does satisfy the concerns embodied in the standing requirements. See *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction") (quotation omitted); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (standing requirements ensure that litigation "is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests") (quotation omitted).

Respondent attempts to cure these defects by adding yet another basis for standing that would be insufficient standing alone. He claims that the presence of the Sunrise Rock cross interferes with his ability "to unreservedly use public land," Pet.

App. 107a, which translates into his prediction that in the future he will go out of the way to avoid seeing the memorial when he visits the Mojave National Preserve. J.A. 65.

Yet Respondent's voluntary change in behavior is not traceable to any government action. For as long as Respondent has been alive, there has been a cross on top of Sunrise Rock, except for some periods of time attributable to this litigation. Rather, Respondent's personal choice to alter his behavior is attributable to a change in his position, not the government's. Thus, his asserted injury is not "fairly traceable" to the challenged conduct - *i.e.*, the placement of the memorial in 1934. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992). Joining three insufficient bases for standing does not make a sufficient one.

II. THE SUNRISE ROCK CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Sunrise Rock cross and the one acre parcel of land on which it was located was conveyed to the Veterans of Foreign Wars pursuant to Congressional legislation in exchange for a five-acre parcel of land located elsewhere in the Mojave National Preserve. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100.

The Ninth Circuit in *Buono IV* upheld the district court's invalidation of the land transfer, which was tied to the district court's prior holding that the Sunrise Rock cross violated the Establishment Clause. 527 F.3d at 782-83. In upholding the district court, the Ninth Circuit presumed the Sunrise Rock cross conveyed a

religious message because it took the form of a Latin cross. It did so by adopting its earlier holding in *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) ("*Buono II*"), that "the presence of the cross in the Preserve violates the Establishment Clause" and that the case was "'squarely controlled'" by its decision in *Separation of Church and State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996). *Buono* v. *Kempthorne*, 527 F.3d 758, 772 (9th Cir. 2008) (quoting *Buono II*, 371 F.3d at 548). Without its prior holding in *Buono II*, the Court could not have found the land transfer violated the Establishment Clause.[2]

In *Separation of Church and State Committee*, the Ninth Circuit held a "fifty-one foot concrete Latin cross with neon inset tubing ... located at the crest of Skinner's Butte" in a public park that was lit for "seven days during the Christmas season, five days during the Thanksgiving season, and on Memorial Day, Independence Day, and Veteran's Day" violated the Establishment Clause. 93 F.3d 617, 618-19. As the court noted, "[t]he cross ha[d] been the subject of litigation since the time it was erected." *Id.* at 618. Although the City of Eugene argued the cross was a war memorial, the court summarily held that

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[2] The court may "consider all of the substantial federal questions determined in the earlier stages of the litigation" including "questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (quotations omitted). Thus, the court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001).

"[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause." *Id.* 620.[3] As noted by Judge O'Scannlain in his concurrence in *Separation of Church and State Committee*, the majority opinion failed to provide an adequate explanation under then-existing precedent as to why the cross at issue violated the Establishment Clause. *Id.* at 620.[4]

Similarly, the Ninth Circuit in *Buono II* and *Buono IV* failed to consider the context of the Sunrise Rock cross, or to afford any weight to distinctions between the Sunrise Rock cross and the

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[3] The Ninth Circuit similarly suggested in dicta in *Ellis* v. *City of La Mesa* that "a sectarian war memorial [consisting of a large Latin cross] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." 990 F.2d 1518, 1528 (9th Cir. 1993). The court quoted with approval the holding of the United States District Court for the District of Columbia that "a cross, '[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message." *Id.* at 1527-28 (quoting *Jewish War Veterans of the United States* v. *United States*, 695 F. Supp. 1, 14-15 (D.D.C. 1987)).

[4] Judge O'Scannlain's opinion canvassed Supreme Court precedent and noted the merits of the City's argument that "the cross has a secular purpose as a war memorial," and that "[w]hile a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be," but felt compelled to invalidate the memorial based on this court's holding in *Allegheny County* v. *Greater Pittsburgh ACLU* that the Establishment Clause "'prohibits government from appearing to take a position on questions of religious belief.'" *Id.* at 626, & n.12 (quoting *Allegheny*, 492 U.S. 573, 593-94 (1989)).

memorial cross at issue in *Separation of Church and State Committee* ("*SCSC*"). In *Buono IV*, the court noted that "[t]he government's several attempts to distinguish *SCSC* were not persuasive" and that "it was of no moment that the cross in *SCSC* was significantly taller, located in an urban area or illuminated during certain holidays." 527 F.3d at 772. The court in *Buono IV* then quoted at length from its prior holding in *Buono II*:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement. ... Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant-neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

527 F.3d at 772 (quoting *Buono II*, 371 F.23d at 549-50 (emphasis added by *Buono IV*)).[5] In short, the

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[5] As Judge O'Scannlain aptly noted in his concurrence in *Separation of Church and State Committee*, "[w]hether a

court's analysis consisted of noting its prior precedent that a Latin cross is a religious symbol and that the presence of a cross on federal land therefore violates the Establishment Clause. Thus ended the court's analysis of the context and message of the Latin cross used in the Sunrise Rock memorial.

By holding that the use of a Latin cross in a war memorial violates the Establishment Clause regardless of other contextual factors, the Ninth Circuit in *Buono IV* failed to apply the contextual analysis required by this Court's decisions in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and plurality and concurring opinions in *Van Orden* v. *Perry*, 545 U.S. 677 (2005).[6] Nor did *Buono II* apply the *Lemon* test or any of its progeny. As noted by Judge

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religious display garners a great deal of attention or is scarcely noticed is irrelevant to the Establishment Clause" and that "how few or how many people view the display does not advance the analysis." 93 F.3d at 625 n.11.

[6] In the context of evaluating the "form and substance of the [land] transaction to determine whether the government action endorsing religion ha[d] actually ceased," the court dropped a footnote stating that it declined to adopt a "presumption of the effectiveness of a land sale to end a constitutional violation." In so doing, the court noted that the "Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry *in this area*" and cited to the court's decisions in *McCreary County* v. *American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) and *Van Orden*, 545 U.S. 677 (2005). *Buono v. Kempthorne*, 527 F.3d at 779 n.14. Unfortunately, the court did not make a similar "fact-specific inquiry" when determining in the first instance whether the use of a Latin cross in a veterans memorial constitutes an establishment of religion.

O'Scannlain in his dissent from the denial of rehearing en banc, the *Buono IV* opinion "fails even to mention the government's argument that the pre-divestment injunction was mooted by the Supreme Court's intervening decisions in *McCreary County* ... and *Van Orden*[.]" *Buono* v. *Kempthorne*, 527 F.3d 758, 764 (O'Scannlain, J., dissenting from the denial of rehearing en banc). Further, Judge O'Scannlain contended that "[b]ecause the central considerations in *Van Orden* are almost entirely on point with the facts of *Buono IV*, such precedent forecloses the continued enforcement of the injunction." *Id.*

Chief Justice Rehnquist's plurality opinion in *Van Orden* generally noted that the *Lemon* test was "not useful in dealing with ... passive monument[s]" such as a Ten Commandments display, opting instead to consider "the nature of the monument" and "our Nation's history." *Van Orden*, 545 U.S. at 686. This history included "'an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). Such acknowledgments included various sculptures and displays located on federal property, including "a 24-foot-tall sculpture," "located outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia," "depicting, among other things, the Ten Commandments *and a cross*." *Id.* (emphasis added). Also of significance was the fact that although the Ten Commandments are religious in nature, they "have an undeniable historical meaning." *Id.* at 690. Thus, Chief Justice Rehnquist cautioned that "[s]imply having religious content or

promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.*

Likewise, while not abandoning the *Lemon* test, Justice Breyer's controlling concurring opinion in *Van Orden*, advised that the judgment necessary to evaluate displays such as the Ten Commandments "must reflect and remain faithful to the underlying purposes of the Clauses," and "*take account of context and consequences* measured in light of those purposes." *Id.* at 700 (emphasis added).[7] Further, Justice Breyer noted that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious" and that "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (citations omitted).

Ultimately, Justice Breyer declared that in borderline cases, there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700. Acknowledging that "[i]n certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)," and "a historical message (about a historic

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[7] See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (quotations omitted).

relation between those standards and the law)," Justice Breyer upheld the Ten Commandments display in *Van Orden* after a consideration of various contextual factors, including the presence of concurrent secular message in addition to the religious one, the involvement of a private organization in selecting and financing the memorial and signs acknowledging that fact, the physical setting of the monument, and the passage of time between the erection of the monument and any challenge to its constitutionality. *Id.* at 701-02.

This Court's holdings in *Van Orden* and *McCreary County* v. *American Civil Liberties Union of Kentucky*, 545 U.S. 844, 868 (2005) ("Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view"); *id.* at 867 ("under the Establishment Clause detail is key"), should at least firmly establish that religious symbols should be judged according to the context in which they are displayed, with some displays passing constitutional muster and others, involving identical symbols, potentially failing the test. See *Van Orden*, 545 U.S. at 690 (Rehnquist, C.J.) ("There are, of course, limits to the display of religious messages or symbols.") (*citing Stone* v. *Graham*, 449 U.S. 39 (1980) (striking down Kentucky statute requiring the display of the Ten Commandments in every public schoolroom)).

That has been the interpretation of *Van Orden* and *McCreary* by various other courts of appeals. The Fifth Circuit has upheld against an Establishment Clause challenge the city insignia of

Austin, Texas, which is derived from Stephen F. Austin's family coat of arms, and topped by a Latin cross flanked by a pair of wings. *Murray* v. *City of Austin*, 947 F.2d 147, 149-50, 158 (5th Cir. 1991). The court upheld the insignia based on its close connection to the city's namesake, the "long-standing unique history" of the insignia and the fact that there was "absolutely no evidence of an intent to proselytize, or advance, any religion." *Id.* at 155.

Similarly, the Tenth Circuit has rejected a *per se* rule of invalidity as to the use of Latin crosses in public displays. In *Weinbaum* v. *City of Las Cruces*, the Tenth Circuit upheld the City of Las Cruces' use of three Latin crosses in the city seal and on municipal property because it is "hardly startling that a City with the name 'The Crosses' would be represented by a seal containing crosses." 541 F.3d 1017, 1035 (10th Cir. 2008). This was particularly appropriate where "indisputable evidence showed that even the name of the City reflected merely the cemetery, representing the violence in the area rather than proselytizing forces in general or a particular faith." *Id.* In the process, the court held that a Latin cross is "unequivocally a symbol of the Christian faith," "[b]ut not exclusively so" and that although it had previously invalidated city seals containing Latin crosses, it did "not issue a per se rule in those cases. *Id.* at 1022, 1023 & n.2 (10th Cir. 2008). Instead, the Tenth Circuit has noted that "[o]n the whole, Establishment Clause cases are predominantly fact-driven, and [cases involving Latin crosses in city seals] are particularly sui generis," requiring an examination of "the purpose, context, and history of the symbol." *Id.* at 1022,

1031. Thus, in contrast to the Ninth Circuit's presumed invalidity, the Fifth and Tenth Circuit decisions establish that at least in some contexts the use of a Latin cross does not, in and of itself, violate the Establishment Clause.

This more context-specific analysis is borne out not just by *Van Orden*, which is merely the most recent in a line of cases evaluating displays with otherwise religious symbols based on their context. Thus, although the Court struck down the isolated display of a crèche in the focal point of a courthouse, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), it upheld the display of a crèche where the context rendered the display nothing more than part of a secular celebration of the holiday season. *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). Thus, the court's treatment of displays of the Ten Commandments and crèches, both inherently religious symbols, indicates that the broader context determines whether those symbols are being used to convey an alternative and permissible secular message.

Although this Court has not previously addressed the constitutional appropriateness of the use of a Latin cross as a war memorial, the court's decision in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753, 770 (1995), provides some guidance. Although the outcome of that case turned on a finding that the cross at issue was private expression in a public forum, Justice Thomas noted in a concurrence that "the fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected

by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one." *Id.* at 770 (Thomas, J., concurring). Justice Thomas also pointed out that a Latin cross takes on a different meaning in the context of the Ku Klux Klan where it is "a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other group hated by the Klan" and is associated with the Klan "not because of religious worship, but because of the Klan's practice of cross burning." *Id.*

Although as Justice Stevens argued, the alternative meaning associated with the Latin cross at issue in *Pinette* could also be construed as an anti-religious message and therefore also impermissible under the Establishment clause, *id.* at 797-98 (opinion of Stevens, J. dissenting) (noting that the Latin cross at issue might convey "completely different messages from [the] symbol" ranging from "an inspirational symbol of the crucifixion and resurrection of Jesus Christ" to "an anti-Semitic symbol of bigotry and disrespect for a particular religious sect"), the various opinions acknowledge that the use of a Latin cross does not also convey a message endorsing Christianity, and allow for the possibility that a Latin cross may be used in such a manner so as to neither convey a primarily religious or anti-religious message. Even Justice Souter's seemingly categorical statement in *Pinette* that the Latin cross "is the principal symbol of Christianity around the world" and its display "alone could not reasonably be taken to have any secular point" was placed in the context of a discussion of the location of the cross "immediately

in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statues close at hand," and the absence of any other private displays. *Id.* at 792 (Souter, J., concurring in part, and concurring in the judgment).

Aside from ignoring this Court's warnings against the use of per se rules in Establishment Clause cases, the Ninth Circuit's lack of contextual analysis ignores the well-established use of unadorned Latin crosses as memorials to fallen soldiers and public servants. See *American Atheists* v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007); *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008). These memorials draw on the association of the Latin cross as an instantly recognizable symbol of death and sacrifice, which are traceable to its prevalent use as a grave marker. Just as the message of the Ten Commandments can have "secular moral message" "about proper standards of social conduct," *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring), so too can a Latin cross symbolize death and sacrifice for our country. And not only are these memorials permitted to reside on federal land, but may also be protected from vandalism by federal law.[8]

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[8] Such is the case with the Irish Brigade Memorial in Gettysburg National Military Park. *See* 16 U.S.C. § 413 (making it a misdemeanor punishable by a fine and imprisonment to willfully destroy, mutilate, deface, injure or remove any monument, statute, marker, guidepost or other structure from any national military park); *id.* at § 430g-6 (authorizing Secretary of Interior to acquire by donation, purchase or exchange, lands outside the boundary of the park on which historic monuments and tablets commemorating the Battle of Gettysburg have been erected).

The Ninth Circuit's per se rule also threatens memorials containing Latin crosses across the country, even in cases where additional contextual factors are present, such as the proximity of the memorial to the location where public servants such as Donald Mackey or Utah State Troopers lost their lives in the line of duty. See *Van Orden*, 545 U.S. at 695 (Thomas, J., concurring) ("If a cross in the middle of a dessert establishes a religion, then no religious observance is safe from challenge.") (citing *Buono II*, 212 F. Supp. 2d at 1204-05).

In the final analysis, the result of the Ninth Circuit's holding in *Buono IV* is nothing less than the adoption of a *per se* rule against the use of crosses in memorials in clear violation of the Court's recent cautionary statements in *Van Orden* and *McCreary County*. See *Van Orden*, 545 U.S. at 690 (plurality opinion of Rehnquist, C.J.) ("[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *id.* at 701 (Breyer, J. concurring) ("focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display"); *id.* at 704 (invaliding a Ten Commandments display "based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public

buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."); *McCreary County*, 545 U.S. at 874 ("Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history"); *see also Lynch*, 465 U.S. at 678 (in Establishment Clause cases, "the inquiry calls for line drawing; no fixed, per se rule can be framed"); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (noting that challenged actions were "not minor trespasses upon the Establishment Clause to which [we] turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.").

Because the Ninth Circuit applied a per se rule of invalidity to the Sunrise Rock cross, it ignored this Court's recent decisions in *Van Orden* and *McCreary County*, which require a contextual analysis when evaluating whether a passive display containing a religious symbol violates the Establishment Clause. Had the Ninth Circuit conducted such an inquiry, it should have noted not only the common secular use of Latin crosses as memorials and gravesite markers, but also the similarity of factors between the Sunrise Rock cross and the Ten Commandments display in *Van Orden*. Absent an underlying Establishment Clause violation, Congress's exercise of its authority under the Property Clause, Art. IV, §3, cl. 2, does not raise any additional constitutional issues.

CONCLUSION

Because the Ninth Circuit applied a per se rule of invalidity to the Sunrise Rock cross, it ignored this Court's recent decisions in *Van Orden* and *McCreary County*, which require a contextual analysis when evaluating whether a passive display containing a religious symbol violates the Establishment Clause. Had the Ninth Circuit conducted such an inquiry, it should have noted not only the common secular use of Latin crosses as memorials and gravesite markers, but also the similarity of factors between the Sunrise Rock cross and the Ten Commandments display in *Van Orden*. This failure warrants reversal by this Court.

Respectfully submitted.

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JUNE 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 15 2009
OFFICE OF THE CLERK

No. 08-472

In The
Supreme Court of the United States

KEN SALAZAR, Secretary
of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF *AMICI CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES, THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, VFW DEPARTMENT OF CALIFORNIA, AMERICAN EX-PRISONERS OF WAR, VFW POST 385, AND LIEUTENANT COLONEL ALLEN R. MILIEFSKY UNITED STATES AIR FORCE (RETIRED), SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent has alleged a concrete injury sufficient to confer standing for him to challenge the transfer of the Mojave Desert Veterans Memorial to private hands, given his explicit judicial admission that he has no objections whatsoever to the display of a cross on private land.

2. Whether the Mojave Desert Veterans Memorial violates the Establishment Clause.

3. Whether the act of Congress providing for the transfer of the Mojave Desert Veterans Memorial to private hands cured any conceivable constitutional violation.

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INTEREST OF *AMICI CURIAE*[1]

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a congressionally chartered veterans service organization that represents over 2.3 million members. Established in 1899, the VFW was instrumental in creating the Veterans Administration, passing the World War II GI Bill and the GI Bill for the 21st Century, and developing the national cemetery system. The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial, the Women in Military Service Memorial, and numerous other memorials in and around the Nation's capital. This case is of great concern to the VFW because it will have final management and ownership responsibility of the Mojave Desert Veterans Memorial ("the Veterans Memorial" or "the Memorial") if the injunction prohibiting transfer of the Memorial is vacated. In addition, the Ninth Circuit's ruling in this case that the Veterans Memorial must be torn down threatens hundreds of other veterans memorials that the VFW helped create as well as the creation of similar veterans memorials in the future.

The American Legion – Chartered by Congress in 1919, The American Legion is a community service

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[1] All counsel of record consented to the filing of this *amici* brief. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

organization representing approximately 2.6 million members, men and women – plus an Auxiliary of nearly 1 million members – in approximately 14,300 American Legion Posts throughout the United States, its territories, and 20 foreign countries, including England, Australia, Germany, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The Legion helps military veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first GI Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those who have honorably served our Nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Ninth Circuit has a detrimental impact on its ability to honor those who have and do serve in our Nation's armed forces.

Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a

weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. It has also erected memorials to Purple Heart recipients in every state in the Nation. The Order is greatly concerned with the outcome of this case as it directly affects the future viability of veterans memorials that honor those who, like the Order's members, have shed their blood in this Nation's service.

Veterans of Foreign Wars, Department of California – The VFW Department of California is the California arm of the VFW responsible for administering VFW programs and initiatives within that state. Accordingly, it works with the VFW membership of California to advance the mission and programs of the VFW within that state and throughout the Nation. This case is of great concern to the VFW Department of California because, in accordance with VFW by-laws and procedure, the VFW Department of California assumed ownership of and responsibility for the Veterans Memorial when the charter of VFW Post 385 was revoked.

American Ex-Prisoners of War ("AXPOW") – AXPOW is a national service organization composed of former prisoners of war from any war involving the

United States, including all former civil internees, and their families. It provides aid to American citizens who were captured by an enemy in time of war. It exists to help former prisoners of war deal with the trauma of their capture and confinement. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the Nation's veterans memorials would dishonor its members, who have been imprisoned in service to this Nation, and only add to their trauma.

VFW Post 385 – VFW Post 385 is located near the Veterans Memorial. Post 385 briefly became defunct in 2007 for failing to satisfy VFW administrative requirements in filing its convention registration. The VFW reactivated Post 385 on May 18, 2009 after it came into compliance with VFW requirements. Post 385, in conjunction with VFW Department of California, intends to maintain and preserve the Veterans Memorial as a memorial to United States veterans.

Lieutenant Colonel Allen R. Miliefsky, USAF Ret. – LTC Miliefsky currently serves as the Commander of the Jewish War Veterans Post 185, San Diego, California. He flew 258 combat missions in Vietnam and in 1968 served as the Battlefield Commander of his AC-47 gunship squadron during the Tet Offensive. Shot down near Danang Air Base, RVN, LTC Miliefsky was awarded the Distinguished Flying Cross for gallantry in battle. He retired from the U.S. Air Force in 1978. LTC Miliefsky has personally undertaken the task of raising the funds needed to place the first monument in Fort Rosecrans National

Cemetery in honor of Jewish war veterans who have made the ultimate sacrifice in service to the Nation. He assists the local Marine Corps Recruit Depot by attending Friday evening Sabbath services with recruits. He has also spoken before veterans groups and to the media to voice his support for the preservation of the Mt. Soledad Veterans Memorial in San Diego, California. The proper resolution of this case is of great concern to LTC Miliefsky given his ongoing efforts to honor the Nation's veterans with lasting memorials.

INTRODUCTION AND SUMMARY OF ARGUMENT

America has long memorialized and honored her fallen patriots. Many of those memorials contain crosses or other religious symbols and messages. The Argonne Cross in Arlington National Cemetery, for example, rests among pine trees representing the Argonne Forest where American servicemen gave their lives during World War I.[2] The Canadian Cross of Sacrifice, also at Arlington, dominates its surroundings with a

[2] See Arlington National Cemetery, Visitor Information, Monument and Memorials, Argonne Cross, http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited June 3, 2009) (noting that the base of the cross contains the inscription "IN MEMORY OF OUR MEN IN FRANCE 1917 1918"). Photographs of veterans memorials referenced in this brief are set forth in Appendix A, App., *infra*, 1a-10a; see *id.* at 4a.

bronze sword affixed to a 24-foot gray granite cross. It sits directly across the road from the Arlington Memorial Amphitheater, visited by thousands each day who go to honor the Tomb of the Unknowns, which bears the inscription, "Here Rests In Honored Glory An American Soldier Known But To God."[3] The Cross of Sacrifice honors those Americans who joined the Canadian Armed Forces to fight in World War I before the United States entered the war. Dedicated in 1927 on Armistice Day, the monument was later modified to honor those who served in World War II and the Korean War.[4]

The Argonne Cross and the Canadian Cross of Sacrifice in Arlington are only two among thousands of veterans memorials with religious imagery erected in military cemeteries, in public parks, and in town squares across our Nation. The monument under constitutional attack in this case is no different. The Mojave Desert Veterans Memorial was erected 75 years ago to honor the "Dead of All Wars" by a group of World War I veterans who had retreated to the

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[3] See Arlington National Cemetery, Visitor Information, Tomb of the Unknowns at Arlington National Cemetery, http://www.arlingtoncemetery.org/visitor_information/tomb_of_the_unknowns.html (last visited June 3, 2009); Arlington National Cemetery, http://www.arlingtoncemetery.net/unk-wwi.htm (last visited June 7, 2009).

[4] See Arlington National Cemetery, Visitor Information, Monument and Memorials, Canadian Cross, http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited June 3, 2009), citing Peters, *Arlington National Cemetery: Shrine to America's Heroes* (2000); App., *infra*, 3a.

isolation of the 1.6-million acre Mojave Desert Preserve in search of solace and healing. For the first 50 years of its existence, the seven-foot-tall cross and plaque that comprise the Veterans Memorial were cared for by a veteran, John Riley Bembry, see App., *infra*, 11a, who served his country as a medic during World War I. Before his death in 1984, Mr. Bembry asked his friend, Henry Sandoz, to look after the Memorial. Although not a veteran himself, Mr. Sandoz was moved by his friend's request and, wishing to offer service to his country, took over the care of the Veterans Memorial.

In 2001, respondent, a former National Park Service ("NPS") employee who lives in Oregon, joined the American Civil Liberties Union ("ACLU") in filing suit to seek removal of the Veterans Memorial, claiming it violated the Establishment Clause. After the district court ordered the Memorial's removal in 2002, Congress enacted legislation with overwhelming bipartisan support to designate the Veterans Memorial as a "national memorial commemorating United States participation in World War I and honoring American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. In addition, Congress instructed the NPS to transfer the single acre upon which the Memorial sits to Post 385 in Barstow, California in exchange for five acres elsewhere in the Mojave Desert Preserve to be donated by Mr. and Mrs. Sandoz. The Ninth Circuit held that the transfer did not cure the purported

Establishment Clause violation and ordered the Veterans Memorial removed.

The Ninth Circuit's ruling that the Memorial must be torn down for the sole reason that it takes the form of a cross evinces precisely the unjustified hostility toward religious symbols in a secular context that this Court condemned in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). If the Ninth Circuit's ruling stands, the immediate result would be the destruction of this 75-year-old Veterans Memorial – causing pain and sorrow to veterans and their families across the Nation. Even worse, it could also presage the destruction of thousands of similar monuments and memorials nationwide, collectively inflicting pain upon our brave veterans and the families of our fallen heroes. If the Ninth Circuit's ruling stands, cherished monuments across the Nation built to honor our veterans will face the prospect of removal, defacement, or destruction. This Court's precedents do not support such an outcome, much less compel it. That is so for at least three reasons.

First, respondent lacks standing to challenge Congress's transfer of the Veterans Memorial to private hands. Respondent failed to plead, and offered no support of, any injury predicated upon such a transfer. Instead, respondent's amended complaint alleged injury based solely upon the display of the cross on *government* land. The record, however, conclusively establishes that respondent has no personal objection to the display of crosses on *private* land. The courts below, by construing the original injunction to

preclude transfer to a private party, granted respondent relief unsupported by his pleadings and for which he lacks standing.

Second, there is no Establishment Clause violation in need of cure under this Court's decision in *Van Orden*, which is controlling. In *Van Orden*, this Court made plain that "[s]imply having religious content * * * does not run afoul of the Establishment Clause." 545 U.S. at 690. The Veterans Memorial has stood for 75 years as a tribute to America's soldiers who paid the ultimate price in defense of freedom. For the first 65 years of its existence, the Memorial stood unchallenged without provoking any legal action or community dissension. The Memorial was constructed by private citizens, maintained by private citizens, and sits in the middle of 1.6 million acres of remote desert land. The federal government was not involved with the Memorial until it sought to save the Memorial from destruction by transferring it to *private* hands. And the government's actions since then have only confirmed the secular status of the Veterans Memorial.

Third, even if there were an Establishment Clause violation, Congress's transfer of the Veterans Memorial to the private ownership of Post 385 remedied it. Ordinarily, once government-owned land is transferred to private hands, state action terminates along with any alleged Establishment Clause violation. And none of the circumstances courts have identified as justifying disregard of a transfer exists in this case.

The Mojave Desert Veterans Memorial, like countless memorials to veterans throughout our Nation, reflects the respect and gratitude due our honored dead. No decision of this Court has ever suggested that those hallowed memorials are unconstitutional. Indeed, those memorials embody the very best traditions of our Nation and our Constitution, which serve to "secure the Blessings of Liberty to ourselves and our Posterity."

ARGUMENT

I. Monuments in the Form of a Cross, Like the Veterans Memorial, Are Commonly Used to Honor American Soldiers Who Fought and Died During World War I.

The Veterans Memorial has stood for 75 years as a silent and solitary witness to the bravery and sacrifice of American soldiers who gave their lives in service to their country. The Memorial, which bears the form of a cross, is typical of many constructed in both the United States and Europe to commemorate soldiers who made the ultimate sacrifice during times of war.

Cross monuments are particularly common in cemeteries holding the remains of those killed during World War I. The loss of life that occurred on the Western Front during World War I remains shocking to this day. From the killing fields of Verdun to the American losses in the Meuse-Argonne Offensive,

soldiers died in unprecedented numbers. Those staggering losses moved surviving warriors to construct military cemeteries to commemorate the war dead. In most cases, a lone cross was chosen as an appropriate marker to memorialize the fallen.

Among the most famous memorials honoring fallen soldiers of World War I is the Cross of Sacrifice. Designed by British architect Sir Reginald Blomfield, the Cross of Sacrifice is a simple white Latin cross adorned with a bronze sword.[5] The Cross of Sacrifice is frequently used as a World War I veterans memorial. From almost every shire in England to the Czech Republic to New Zealand, World War I memorials typically feature a lone cross.[6]

America likewise has honored its fallen soldiers by constructing large military cemeteries, many located on foreign soil. In Aisne-Marne,[7] St. Mihiel,[8]

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[5] See Commonwealth War Graves Commission, Architecture, http://www.cwgc.org/content.asp?menuid=2&submenuid=10&id=10&menuname=Architecture&menu=sub (last visited June 3, 2009).

[6] See, *e.g.*, App., *infra*, 8a, 9a, 10a.

[7] American Battle Monuments Commission, Aisne-Marne American Cemetery and Memorial, http://www.abmc.gov/cemeteries/cemeteries/am.php (last visited June 3, 2009).

[8] American Battle Monuments Commission, St. Mihiel American Cemetery and Memorial; App., *infra*, 7a.

and Meuse-Argonne[9] – the largest American military cemetery located on foreign soil – the white Latin cross is a ubiquitous sight. One of the most moving and well-known memorials to our veterans is the American cemetery in Colleville-sur-Mer, Normandy, France, with its row upon row of white crosses and "main paths * * * laid out in the form of a Latin cross."[10] The cemetery contains the remains of 9,387 soldiers who gave their lives during the Allied invasion of Europe that hastened the end of World War II.[11] The thousands of white Latin crosses and Stars of David that mark the graves of these brave soldiers are internationally recognized symbols honoring their ultimate sacrifice for the cause of freedom.

Veterans memorials in the shape of a cross can also be found across America. Perhaps most well known is the Cross of Sacrifice in Arlington National Cemetery. Donated by the Canadian Government, the 24-foot, solid granite cross honors Americans who joined the Canadian army – which entered the war well in advance of America – to fight in Europe.[12] Similarly, the Argonne Cross stands in Arlington

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[9] American Battle Monuments Commission, Meuse-Argonne American Cemetery and Memorial; App., *infra*, 1a.

[10] American Battle Monuments Commission, Normandy American Cemetery and Memorial at 6-7, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited June 4, 2009).

[11] American Battle Monuments Commission, http://www.abmc.gov/cemeteries/cemeteries/no.php (last visited June 3, 2009).

[12] See Arlington National Cemetery, Visitor Information, Monument and Memorials, *supra* n.4; App., *infra*, 3a.

National Cemetery amidst a grove of 19 pine trees – a 13-foot high marble monument to "OUR MEN IN FRANCE 1917 1918."[13]

Other memorials include the French Cross Monument in Cypress Hill National Cemetery in New York,[14] the Unknown Soldiers Monument in Prescott National Cemetery in Arizona,[15] the Memorial Peace Cross in Maryland,[16] the Wall of Honor at the Pennsylvania Military Museum,[17] and countless others. And, of course, individual crosses mark the final resting places of America's war heroes in military cemeteries across the Nation.[18]

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[13] See Arlington National Cemetery, Visitor Information, Monument and Memorials, *supra* n.2. Respondent may argue that private graves are different because they are personal choices of each soldier's family. However, the cross memorials in Arlington are not graves and were installed by the government as government speech.

[14] See United States Department of Veterans Affairs, Burial & Memorials, Cypress Hills National Cemetery, http://www.cem.va.gov/cems/nchp/cypresshills.asp (last visited June 3, 2009); App., *infra*, 5a.

[15] See United States Department of Veterans Affairs, Burial & Memorials, Prescott National Cemetery, http://www.cem.va.gov/cems/nchp/prescott.asp (last visited June 3, 2009).

[16] See Historical Marker Database, Peace Cross, http://www.hmdb.org/marker.asp?marker=5187 (last visited June 3, 2009); App., *infra*, 6a.

[17] See Pennsylvania Military Museum, Wall of Honor, http://pamilmuseum.org/medals/medals.htm (last visited June 3, 2009).

[18] The centrality of cross imagery in military culture can also be seen in decorations such as the Distinguished Service Cross, the Distinguished Flying Cross, the Navy Cross, and the

(Continued on following page)

Those examples are only a few of the veterans memorials with religious imagery standing in silent testimony in military cemeteries, in public parks, and in town squares across the Nation. For centuries, memorials containing religious symbolism have evoked, honored, and solemnized the ultimate sacrifice made by this country's fighting men and women. If the Court holds that the existence of these monuments on government land gives rise to a constitutional violation, and the Court concludes that the transfer of the land to private parties does not cure that violation, the only remaining option would be the removal, defacement, or destruction of countless cherished memorials across the Nation.[19]

Air Force Cross. See United States Armed Forces Awards, Decorations, Campaign & Service Medals, http://www.tioh.hqda.pentagon.mil/Awards/Ribbons/OrderofPrecedence.htm (last visited June 3, 2009).

[19] It is no answer to say, as respondent does, that removal would not necessarily be required because the land upon which the Veterans Memorial and others like it stand could simply be sold to the highest bidder. See Br. in Opp. at 28-29. That is cold comfort to veterans and their families. An auction would do nothing to prevent the purchasers from subsequently destroying or altering the memorials, much less ensure their continued maintenance and protection. Instead, the memorials honoring the ultimate sacrifice that these veterans made for our country's freedom would simply be up for sale to the highest bidder.

A. World War I Veterans Constructed the Memorial to Honor Their Fallen Comrades.

The Veterans Memorial was built in 1934 by members of a local VFW post who were living in the eastern region of the Mojave Desert. Many were veterans of World War I who moved to the desert on the advice of physicians to recover from "shell shock" and other physical and emotional maladies. Once there, many became miners, ranchers and prospectors. They also formed VFW posts throughout the region.[20]

Those veterans selected Sunrise Rock as an appropriate place to erect a memorial – in part because they believed there was a color shading on the Rock in the shape of an American soldier or "doughboy." See App., *infra*, 12a. The veterans memorialized their intent to commemorate their fallen comrades on a plaque accompanying the monument that read: "The Cross, Erected in Memory of the Dead of All Wars, erected in 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." *Buono* v. *Norton*, No. 05-55852, Appellee's Excerpts of Record at 11, 14 (hereinafter "Appellee's Excerpts of Record"). The bottom portion of the plaque was decorated with VFW decals. *Id.* at 20. The original memorial was

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[20] VFW Department of California, Mojave Desert Veterans Memorial, http://www.vfwca.org/images/memorial_write_up_final.pdf (last visited June 5, 2009).

constructed of metal pipe and painted white. *Ibid*; App., *infra*, 13a.

Beginning in 1934, a local resident named John Riley Bembry assumed responsibility for maintaining the Memorial. Mr. Bembry served in the U.S. Army during World War I as a medic. After the war, he moved to the Mojave Desert and began staking out small mining claims. Mr. Bembry lived in a makeshift mining camp roughly seven miles north of the Veterans Memorial. He was a member of Death Valley VFW Post 2884. See VFW Department of California, Mojave Desert Veterans Memorial, *supra* n.20.

Although not a religious man, Mr. Bembry faithfully cared for the Memorial for nearly 50 years until his death in 1984. After vandals destroyed the original Memorial, Mr. Bembry, his health failing, asked his close friend and fellow desert resident Henry Sandoz to replace it. Agreeing to the request, Mr. Sandoz erected a new cross made of wood. Mr. Bembry died before replacing the plaque. *Ibid.*

Before his death, Mr. Bembry asked Mr. Sandoz to assume care for the Memorial. Mr. Bembry told Mr. Sandoz that the Memorial meant a great deal to him and that he viewed his caretaking duties as his obligation to his comrades who paid the ultimate price during World War I. Moved by his friend's commitment and dedication, Mr. Sandoz agreed to assume responsibility to care for the Memorial. Mr. Sandoz,

who had not served in the military, viewed his caretaking role as an opportunity to serve American veterans and thank them for their sacrifice. *Ibid.*

In 1986, after the Veterans Memorial was again vandalized and some nearby graves were desecrated, Mr. Sandoz decided to restore the Memorial to its original form. Using an old photograph of the original Memorial as a guide, see App., *infra*, 13a, Mr. Sandoz made a cross out of four-inch metal pipe and painted it white. He then bolted the cross to Sunrise Rock and filled it with concrete to discourage vandalism. After restoring the Veterans Memorial, Mr. Sandoz continued to care for it. See VFW Department of California, Mojave Desert Veterans Memorial, *supra* n.20.

B. The United States Has Consistently Recognized the Memorial's Status as a War Memorial and Has Taken No Action That Could Fairly Be Interpreted as Advancing or Endorsing Religion.

The Veterans Memorial stood without legal challenge for approximately 65 years. During that time, the federal government took no action whatsoever with respect to the Memorial. Nor did members of the local community, or tourists who visited the Mojave National Preserve, object to the presence of the Memorial on government land or raise any legal challenge to it.

That lengthy period of tranquility ended on October 6, 1999, when the ACLU sent a demand letter to

the Regional Director of the NPS and the Superintendent of the Mojave National Preserve requesting removal of the Veterans Memorial on Establishment Clause grounds. Appellee's Excerpts of Record at 4-5. Every act taken by the federal government since then has only confirmed the secular status of the monument as a memorial to fallen soldiers. For example, in a response to the initial demand letter, Assistant Field Solicitor Larry Bradfish of the Department of the Interior observed that the original memorial "was erected in 1934 by a local VFW post in honor of war dead." *Id.* at 6. Responding to a second demand letter, John Reynolds, Regional Director of the Pacific West Region of the NPS, noted that the original memorial was "believed to have been erected in 1934 by members of a local Veterans of Foreign Wars chapter along with a wooden plaque commemorating the fallen veterans of World War I." *Id.* at 15. A research memorandum drafted by Mark Luellen, a historian in the Pacific Great Basin Support Office of the NPS, concluded that the memorial "was erected by the Veterans of Foreign Wars in 1934 as a memorial to honor the war dead," and that the "general appearance of the memorial is largely the same as it was in 1934" with only the commemorative plaque missing. *Id.* at 20.

Despite those attestations to the secular purpose of the Veterans Memorial, the Superintendent of the Mojave National Preserve unfortunately announced to her staff on October 6, 2000, that she intended to

remove the Memorial. She pointed specifically to the threat of "personal damages against those government officials that knew about the cross, yet did not remove it" as the reason for her decision. *Id.* at 24. Shortly thereafter, and before the Memorial could be removed, Congress enacted legislation to prohibit the Secretary of the Interior from expending any funds to remove the Memorial. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230 (Dec. 21, 2000). One year later, Congress designated the Veterans Memorial as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. Congress also directed that not more than $10,000 be used by the Department of Interior to "acquire a replica of the original memorial plaque and cross placed at the national World War I memorial * * * and to install the plaque in a suitable location on the grounds of the memorial." § 8137(b), 115 Stat. at 2278-79.

Far from endorsing (or even mentioning) religion, Congress's actions reaffirmed the historical purpose of the Veterans Memorial – to honor America's war dead. Indeed, by mandating the reinstallation of the original plaque, Congress explicitly endorsed the longstanding secular purpose of the Memorial. Despite those efforts, the district court ruled that the Veterans Memorial offended the Constitution and

ordered the Memorial's removal. The Memorial was then covered by a tarpaulin sack. App., *infra*, 2a. Congress responded by enacting legislation requiring the Secretary to convey the Veterans Memorial to the Veterans of Foreign Wars Post 385. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100 (requiring conveyance of the real property "designated * * * as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war").

II. Respondent Lacks Standing to Challenge the Government's Transfer of the Veterans Memorial to Private Hands.

Petitioners correctly argue that respondent lacks standing to challenge the transfer of the Veterans Memorial to private ownership because his ideological objection to that transfer does not constitute an injury in fact under *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Pets.' Br. at 12-19. *Amici* respectfully suggest that respondent lacks standing for yet another reason: He failed to plead or offer alleged support for *any* injury arising from the transfer. Respondent's amended complaint alleged injury arising solely out of the Memorial's display on *government* land. J.A. 50. By nonetheless construing the original injunction to preclude transfer of the Memorial to a *private* party, the courts below erred in

granting respondent relief for which he lacks standing.[21]

A. Standing Is Determined by the Presence Or Absence of a "Distinct and Palpable Injury" That Must Exist At All Stages of the Litigation.

A plaintiff must "demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000). To demonstrate standing, a claimant must present an actual or threatened injury that is fairly traceable to the challenged action and likely to be redressed by a favorable ruling. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be concrete, particularized, "distinct and palpable." *Gollust* v. *Mendell*, 501 U.S. 115, 126 (1991).

The standing elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." See, *e.g.*, *Lujan*, 504 U.S. at 561. Each element "must be supported in the same way as any other matter on which the plaintiff bears the

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[21] There is nothing to be gained by allowing respondent to attempt to cure his standing problem. That problem is incurable because respondent has already judicially admitted that he is not an offended observer of the Memorial in private hands. J.A. 50 (stating that "Mr. Buono has no objection to Christian symbols on private land * * * ").

burden of proof." *Ibid.* A plaintiff's failure to provide factual support for each allegation of injury for which he seeks relief necessarily results in a lack of standing. *Doe* v. *Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (*en banc*) (no standing where plaintiff did not offer evidence he was exposed to invocations at any meeting sponsored by defendant). Where, as here, a court grants relief that a plaintiff has no standing to seek, that judgment is subject to reversal. *Id.* at 499.

B. There Is No Basis in the Record For an Injury Arising From the Challenged Transfer of the Veterans Memorial.

The record is devoid of any evidence that respondent would be injured by the government's transfer of the Veterans Memorial to the private ownership of the VFW. To the contrary, respondent's own evidence conclusively establishes that transferring the Memorial to a private party would *cure* all injuries originally alleged. For example, in his amended complaint, respondent sought an injunction to restrain the federal government "from continuing to allow the display of this sectarian symbol *on government-owned land*." J.A. 49 (emphasis added). Respondent specifically averred that he had "no objection to Christian symbols on private property," and only took offense at "the display of a Latin Cross on *government-owned* property – property that is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50 (emphasis added).

In his deposition, respondent reaffirmed his alleged injury:

> Q: "The only thing that's offensive about this cross is that you've discovered that it's located on federal land?"
>
> A: "Correct."

J.A. 85.

The district court's original injunction recognized the limited scope of respondent's alleged injury: "A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable because it rests on federal land." *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002); *id.* at 1217 ("the presence of the cross on the federal land portion of the Preserve is unconstitutional"). After Congress ordered the transfer of the Memorial to the VFW, respondent filed a Motion to Enforce, or in the Alternative, Modify the Permanent Injunction, stating that:

> [T]he land transfer [Section 8121] effects [sic] violates the Establishment Clause. Accordingly, Plaintiff respectfully request[s] that the Court either hold that Section 8121 violates its July 24, 2002, permanent injunction, and prohibit its implementation, or modify the injunction explicitly to prohibit Defendants from implementing Section 8121.

Appellee's Excerpts of Record at 101. Thus, respondent's motion effectively added a new claim for relief alleging not only that the *presence* of the Memorial on

government land, but also the *transfer* of the Memorial violates the Establishment Clause.

Even assuming respondent had standing to seek an injunction restraining the federal government from *displaying* the cross on federal land, respondent's alleged injury – offense engendered by a cross on *government* land – cannot create standing for his separate, discrete request for an injunction restraining the federal government from *transferring* the land on which the cross stands to private hands. See *Lewis* v. *Casey*, 518 U.S. 343, 358, n.6 (1996) ("standing is not dispensed in gross"). Respondent bears the burden to "demonstrate standing separately" for this new "form of relief." *Friends of the Earth, Inc.*, 528 U.S. at 185. He cannot satisfy that burden because there is no evidence in the record of any injury fairly traceable to the transfer of the Veterans Memorial that can be redressed by a favorable ruling. See *Lujan*, 504 U.S. at 561.

Indeed, respondent has never disclaimed his previous statement that he has "no objection to Christian symbols on private property." J.A. 50. Respondent's attempt to enjoin the transfer is thus foreclosed by the "'long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.'" *Spencer* v. *Kemna*, 523 U.S. 1, 10-11 (1998) (quoting *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 231 (1990) (citations omitted)).

This Court's recent decision in *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), confirms that conclusion. In that case, this Court held that Article III jurisdiction over an original claim does not extend to a new claim simply because they both "derive from a common nucleus of operative facts." *Id.* at 351 (rejecting application of supplemental-jurisdiction test in the standing context). As the Court explained, if the standing requirement were "commutative," then this Court's insistence that "a plaintiff must demonstrate standing separately for each form of relief sought * * * would make little sense." *Id.* at 352 (internal quotation marks and citation removed). Similarly, if this Court's teaching that standing must be demonstrated for each form of relief can be evaded merely by broadening the scope of an injunction to grant relief for which respondent lacks standing, then this Court's articulations of what Article III requires "would be rendered hollow rhetoric." *Id.* at 353 (citing *Lewis*, 518 U.S. at 357).

III. The Government's Transfer of the Veterans Memorial to Private Hands Raises No Establishment Clause Concerns.

Despite the clear and unmistakable language Congress used when transferring the land at issue in requiring it to be used solely as a memorial to the veterans of World War I, the Ninth Circuit held that Congress had impermissibly sought to evade the district court's injunction barring the federal government from perpetuating an Establishment Clause

violation on federal land. *Buono* v. *Kempthorne*, 527 F.3d 758, 782 (9th Cir. 2008) ("We also agree that 'the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation.'" (quoting *Buono* v. *Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005))). That conclusion is incorrect for two reasons. First, the transfer could not have perpetuated an Establishment Clause violation because one did not exist in the first place. This Court's decision in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), compels the conclusion that the mere presence of the Veterans Memorial on federal land did not violate the Establishment Clause. Second, even if there were an Establishment Clause violation, the congressionally mandated transfer of the Veterans Memorial to the VFW cured it. "[A]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its [alleged] inappropriate endorsement of religion." *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000); *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 702-03 (7th Cir. 2005).

A. The Presence of the Veterans Memorial on Federal Land Is Permissible Under *Van Orden*.

In *Van Orden*, a plurality of this Court adopted a context-specific, fact-driven analysis for assessing claims, like the one in this case, that a passive monument violates the Establishment Clause. 545 U.S. at

686.[22] Likewise, Justice Breyer's opinion concurring in the judgment agreed that in Establishment Clause cases involving longstanding passive monuments, there is "no * * * substitute for the exercise of legal judgment." *Id.* at 700 (Breyer, J., concurring in the judgment). In this case, the presence of the Veterans Memorial on federal land is permissible when evaluated in light of the monument's nature, history, and context, as *Van Orden* requires. Any other result would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704 (Breyer, J., concurring in the judgment). Indeed, Justice Breyer focused in particular on the extended period of time that the Texas monument had stood without controversy and on the lack of divisiveness those decades reflected:

> This display has stood apparently uncontested for nearly two generations. That experience helps us understand as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I

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[22] If the Court is inclined to adopt the coercion test articulated by Justice Kennedy in *County of Allegheny* v. *ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), this case presents an ideal vehicle to do so. Under that test, the Mojave Desert Veterans Memorial easily survives constitutional scrutiny. See *id.* at 662 ("[W]here the government's act of recognition or accommodation is passive and symbolic * * * any intangible benefit to religion is unlikely to present a realistic risk of establishment.").

> believe, critical in borderline cases such as this one.

Ibid. (Breyer, J., concurring in the judgment). Under *Van Orden*, the present case is straightforward. In every respect, the arguments supporting the constitutionality of the Veterans Memorial are stronger and more compelling than those in *Van Orden*.

First, the sole historical purpose of the Memorial is to commemorate fallen war veterans, just as similar memorials commemorate fallen soldiers the world over. The Memorial was constructed by members of a private organization, the VFW, dedicated to serving America's veterans. It was maintained for 30 years by a proud veteran of the First World War in memory of his fallen comrades. It was then maintained from 1984 until 1999 by a man seeking only to honor his country's warriors and the memory of his friend. And, until the Memorial was threatened with destruction, the federal government's only "action" with respect to the Memorial had been benign neglect.

Second, the VFW, an indisputably secular organization, erected and has overseen the maintenance of the Veterans Memorial – not the government. Indeed, the VFW never even donated the Veterans Memorial to the government. The VFW originally erected the Memorial without any government approval and has seen to its maintenance throughout the Memorial's history. And contrary to respondent's contentions, see

Br. in Opp. at 19-20, the government's recognition of the Veterans Memorial as a war memorial has not altered the VFW's responsibility to care for and maintain the monument.

Third, "the circumstances surrounding the display's placement * * * and its physical setting" in the Mojave Desert suggest little of the sacred or the sectarian. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). Although a passerby, uneducated about the history of the Veterans Memorial, might perceive the cross as a religious symbol, the question under *Van Orden* is not whether the monument has facially religious content, but "how the [content] is *used*." *Ibid.* (Breyer, J., concurring in the judgment). The context and history of the Ten Commandments monument in *Van Orden* suggested that the State "intended the * * * nonreligious aspects of the tablets' message to predominate" by conveying "an illustrative message reflecting the historical 'ideals' of Texans." *Id.* at 701-02 (Breyer, J., concurring in the judgment). Here, it is even clearer that the Memorial's predominant message – to commemorate American war dead – is secular because similar monuments are used for similar purposes throughout the world. Given that history – and the remote location of the Memorial – it is not surprising that the Veterans Memorial stood without legal challenge or community complaint for 65 years until this litigation.

By any measure, the Ten Commandments monument upheld in *Van Orden* was more closely tied to

religion, had a shorter history, and was located in a far more prominent and public space than the Veterans Memorial. The *Van Orden* monument is covered with indisputably religious text, including "I AM THE LORD THY GOD" as its pinnacle; in contrast, the Veterans Memorial has no religious writing at all on its plaque, only a dedication to the "Dead of All Wars." The *Van Orden* monument sat undisturbed and without controversy for over 40 years; the Veterans Memorial sat undisturbed and without controversy for nearly twice as long. And the *Van Orden* monument sits today within 100 feet of the Texas Capitol; in contrast, the Veterans Memorial sits in the middle of 1.6 million acres of remote desert land.

To be sure, a cross is an indisputably religious image, but not nearly to the degree that is a direct physical representation of the baby Jesus, upheld by this Court in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). And not nearly to the degree of the Ten Commandments, a text sacred to millions and believed to have been written by the hand of God Himself. Moreover, the cross has a far more marked secular significance, given its ubiquity commemorating veterans memorials throughout the world.

Indeed, the content of the *Van Orden* monument was determined by a panel of religious leaders of different faiths; in contrast, the content of the Veterans Memorial was determined by World War I veterans returning from a global war to acknowledge their dead comrades in the same way they observed similar

European acknowledgements. The *Van Orden* monument acknowledged religion; the Veterans Memorial acknowledges our veterans.

Just as the Ten Commandments, while unquestionably religious, have also had a significant secular impact on law and culture, so also has the image of a cross, while unquestionably religious, had for centuries a prominent role in commemorating veterans. The image of the Ten Commandments – carved into the very courtroom of this Court numerous times – reflected that dual history, just as do the thousands and thousands of crosses throughout the world, commemorating veterans who have given their lives in service.

In sum, the monument upheld in *Van Orden* presented a much closer question under the Establishment Clause than the Veterans Memorial under attack here. With no Establishment Clause violation to remedy, the transfer of the Veterans Memorial to private ownership could not have perpetuated any such "continuing" violation.

B. The Transfer of the Veterans Memorial to Private Hands Remedied Any Establishment Clause Violation.

Even if there were an Establishment Clause violation here, the congressionally mandated transfer of the Veterans Memorial from the federal government to the private ownership of the VFW cured it. Ordinarily, once government-owned land is transferred

to a private party, state action terminates along with any alleged violation of the Establishment Clause. *Marshfield*, 203 F.3d at 491-92. None of the "unusual circumstances" that could justify disregarding a transfer is present in this case. See *id.* at 492.[23]

The Seventh Circuit has observed that where a transfer does not "comply with applicable state law," is made to a "straw purchaser" for purposes of allowing continued government control, involves a sales price "well below fair market value," or takes place in a location where "the presence of the government is pervasive and inescapable," a transfer may not cure the alleged Establishment Clause violation. *Mercier*, 395 F.3d at 702-03 (citations omitted); *Marshfield*, 203 F.3d at 492. None of those "unusual circumstances" exists here. The federal law transferring the property was properly approved, Post 385 is the true

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[23] Respondent advances several arguments against the land transfer acting as a cure. None has merit. First, respondent argues that state action has not terminated because the Memorial remains designated as a veterans memorial by the federal government. Br. in Opp. at 19. Such an argument would not only invalidate countless veterans memorials, but also misses the mark. If the designation is the violation, the remedy is not removing the Memorial but rather the designation. Second, respondent's argument that because the Mojave Preserve is mostly government land, a veterans memorial bearing religious imagery, even if on private property, violates the Establishment Clause proves too much. See *id.* at 19. It would render any religious symbol on privately held ranches in the Mojave Preserve equally constitutionally offensive. Under respondent's theory, the government would have an obligation to root out those private displays and remove them.

recipient of the property, and the government is receiving market value in the form of a similarly sized parcel of land in exchange. The control and maintenance of the one-acre plot would be fully ceded to Post 385. And the monument is located in the middle of a remote desert preserve, with no perceptible government presence in the vicinity – much less a "pervasive and inescapable" one.

The government's motive for the transfer is immaterial to the Establishment Clause inquiry, because once state action terminates there can be no continuing constitutional violation. Thus, even where the government transfers property in response to an Establishment Clause challenge, the transfer remains effective to cure any constitutional violation. See *Mercier*, 395 F.3d at 702 (acknowledging that the transfer occurred when the city faced a lawsuit for the removal of the memorial); *Marshfield*, 203 F.3d at 491 (upholding the transfer even though it was intended to circumvent the government action requirement). That makes perfect sense. A government's good-faith efforts to divest itself of a challenged monument should not somehow be held against it.

That principle should apply with particular force in this case, where respondent has never offered any evidence that the federal government ever had *any* motive other than honoring veterans. Especially in a time of war, such action is deserving of respect – not condemnation as a violation of the Constitution.

If anything, the potential for inflicting pain on the families of our fallen heroes by removing, destroying, or altering veterans memorials based on allegations that they violate the Establishment Clause highlights the importance of transfer as a constitutional "safety valve" to prevent the defacement and destruction of these memorials. That way, a government entity faced with a colorable Establishment Clause claim at least has the opportunity to transfer the property to a responsible private party who can preserve and maintain these historic war memorials.

C. The Issue of Transfer is Not Moot.

Respondent contends that this case may be moot because Post 385 briefly became defunct after Congress ordered the transfer of the Veterans Memorial. That is not so. Upon Post 385's becoming defunct, all of its property interests – including its vested present interest in the Memorial – passed immediately to the VFW Department of California, as dictated by the VFW bylaws. The VFW Department of California stands ready as Post 385's successor-in-interest to receive the transfer of the Memorial if this Court vacates the injunction. In addition, Post 385 is now "restored to good working order" and committed to preserving and protecting the Veterans Memorial. App., *infra*, 20a. Consequently, the dispute over the constitutionality of transfer is not moot.

1. The VFW Department of California is Post 385's successor-in-interest, and therefore the case is not moot.

The dissolution of an organization such as Post 385 does not moot a live controversy where, as here, the action would affect the rights of a valid successor-in-interest. See *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944); *United States* v. *Zolin*, 491 U.S. 554, 557 n.3 (1989) (death of a party does not render a case moot when the case could affect a party's estate); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631, 638 (1949) (noting that the Court "adheres to the familiar rule that a judgment against or in favor of a corporation is not erased by subsequent dissolution"). Although Post 385 briefly became defunct, the case is not moot because Post 385's vested interest in the Veterans Memorial passed to the VFW Department of California, its successor-in-interest, under VFW bylaws.

In 2007, three years after Congress enacted Section 8121 and granted a present interest in the land underlying the Veterans Memorial to Post 385, the Post failed to satisfy VFW administrative requirements in filing its convention registration. The Post's charter was revoked, and it became defunct. In that instance, the VFW bylaws call for the relevant state department – here the VFW Department of California – to assume ownership of Post 385's property, including its interest in the Memorial. Under Section 212 of the bylaws, when a local post becomes defunct, "the property of the Post shall be handled as

prescribed in Section 210" of the corresponding Manual of Procedure, which reads:

> In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, *shall be immediately recovered* by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.

App., *infra*, 16a (emphasis added). Pursuant to the bylaws, the VFW Department of California did in fact assume ownership over Post 385's property, including its interest in the Veterans Memorial.[24] As the successor to Post 385 and owner of the present interest in the Veterans Memorial conveyed by Section 8121, the VFW Department of California possesses a live stake in this controversy.

---

[24] This has been the VFW's standard procedure for many decades. See, *e.g.*, *Veterans of Foreign Wars, Post No. 837* v. *Byrom*, 357 S.W.2d 426 (Tex. Civ. App. 1962) (following revocation of a post's charter the VFW state department claimed the post's property under the national bylaws); *Chaplain Kieffer Post 1081* v. *Wayne County Veterans Ass'n*, 1988 Ohio App. LEXIS 3815, at *1-2 (Ct. App. Sept. 21, 1988).

2. Post 385's interest in the Veterans Memorial vested immediately upon the enactment of the transfer statute.

Respondent does not dispute that, as a general matter, the VFW Department of California can receive the conveyance of the Veterans Memorial as Post 385's successor-in-interest. Br. in Opp. at 32. Instead, respondent contends that Post 385's interest in the Memorial never vested. That is incorrect. Post 385 received a present, vested interest in the Memorial when Congress enacted the transfer statute, which plainly dictates that "in exchange for the private property described in subsection (b), the Secretary of the Interior *shall convey* to the Veterans Home of California – Barstow, Veterans of Foreign Wars Post #385E * * * all right, title, and interest of the United States in and to" the Memorial. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100 (emphasis added). The statute also defined the terms of payment (a land exchange), and provided for an appraisal and cash equalization, if necessary to ensure a fair exchange. *Id.* § 8121(b)-(d). This Court has long held that statutory land grants, such as the transfer statute at issue here, convey a vested, present interest in the land designated even if the land itself has yet to be transferred. See, *e.g.*, *Deseret Salt Co.* v. *Tarpey*, 142 U.S. 241, 253 (1891); *Leavenworth, L. & G. R.R.* v. *United States*, 92 U.S. 733, 741 (1875); *Rutherford* v. *Greene's Heirs*, 15 U.S. (2 Wheat.) 196 (1817).

Respondent resists that conclusion by claiming that the transfer statute contains "conditions precedent" that must be satisfied before an interest vests in Post 385. Br. in Opp. at 32-33. But the text of the statute belies that contention. The statute provides that "in exchange for" and "as consideration for" the land provided by the Sandozes, the Secretary "shall convey" the Veterans Memorial. Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100. It is black-letter law that "payment of the consideration is not a condition precedent." *Forum Inv. Co.* v. *Cement Stave Silo Co.*, 219 F. 213, 218 (8th Cir. 1914); see also 3 Richard A. Lord, *Williston on Contracts* § 7:18 (4th ed. 2008). The requirements for an appraisal and potential cash payment in order to ensure a fair exchange are part and parcel of the consideration required, not conditions precedent.

This Court has repeatedly rejected arguments that the need for future action prevents the vesting of a statutory land grant. *Rutherford*, 15 U.S. at 196 (statute providing that "twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene" created vested and transferable interest); *Schulenberg* v. *Harriman*, 88 U.S. 44, 62 (1874) (statute's words "must be taken in their natural sense to import immediate transfer of title, although subsequent proceeding may be required to give precision to that title"); *Leavenworth*, 92 U.S. at 741 (explaining that statute "[vested] a present title in the State of Kansas though a survey of the lands and a location of the road are necessary to give

precision to it"); *Deseret Salt Co.*, 142 U.S. at 253 (statute's provision that "before any land granted by the act shall be conveyed * * * there shall first be paid * * * the cost of surveying, selecting, and conveying the same" was not "designed to impair the force of the operative words of transfer"). Just as in those cases, Congress here granted Post 385 a present interest in the Veterans Memorial subject only to future actions to effect the conveyance. Post 385's present interest was thus fully transferable to its successor-in-interest.

In addition, Post 385 is now fully operational and stands ready with the VFW Department of California to preserve the Veterans Memorial. App., *infra*, 20a. Thus, even if the VFW Department of California could not serve as the successor-in-interest, Post 385 would still be standing ready to receive its property interest. Either way, respondent's mootness argument fails.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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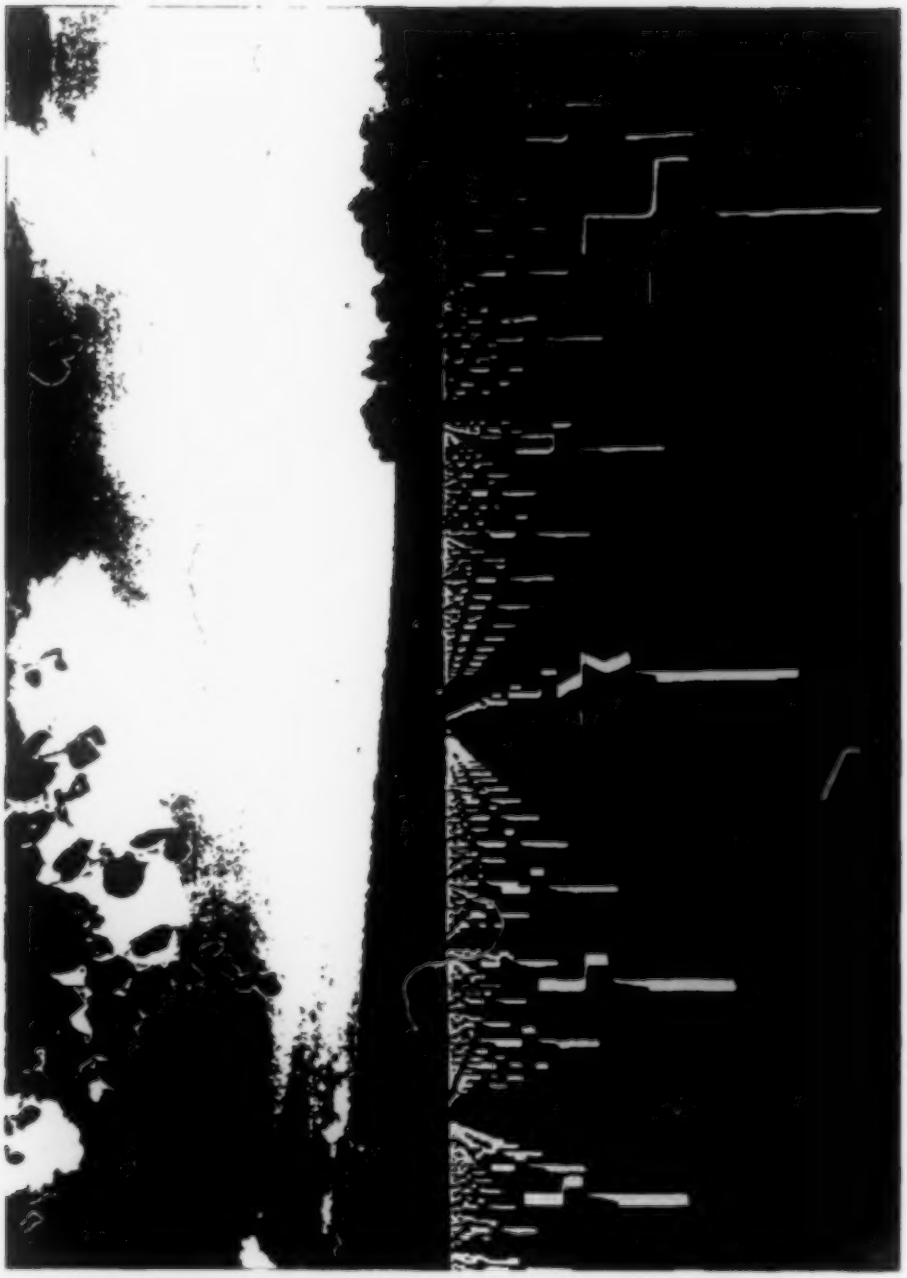
Dated: June 8, 2009



American Battle Monuments Commission, Meuse-Argonne American Cemetery and Memorial, http://www.abmc.gov/cemeteries/cemeteries/ma.php (last visited June 5, 2009).

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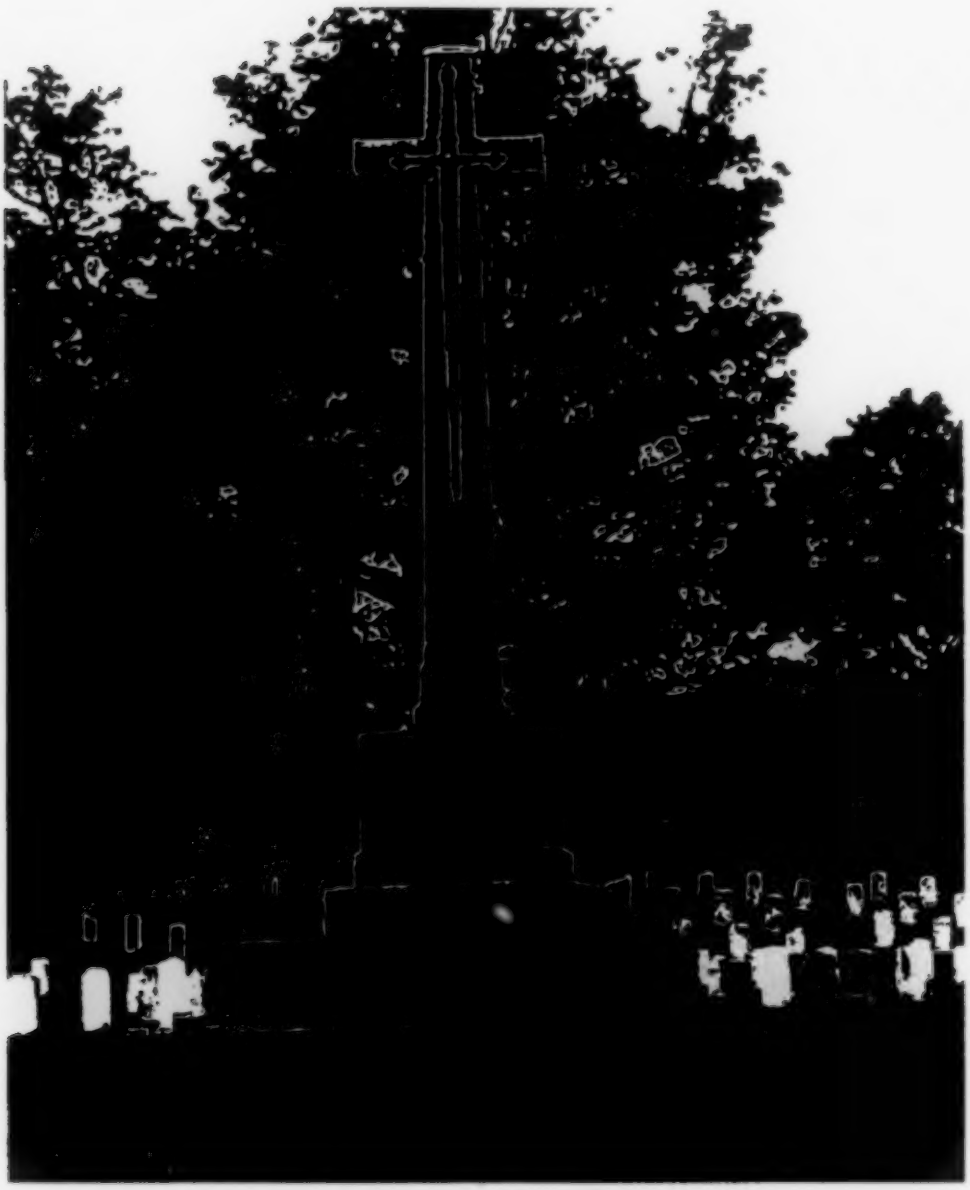
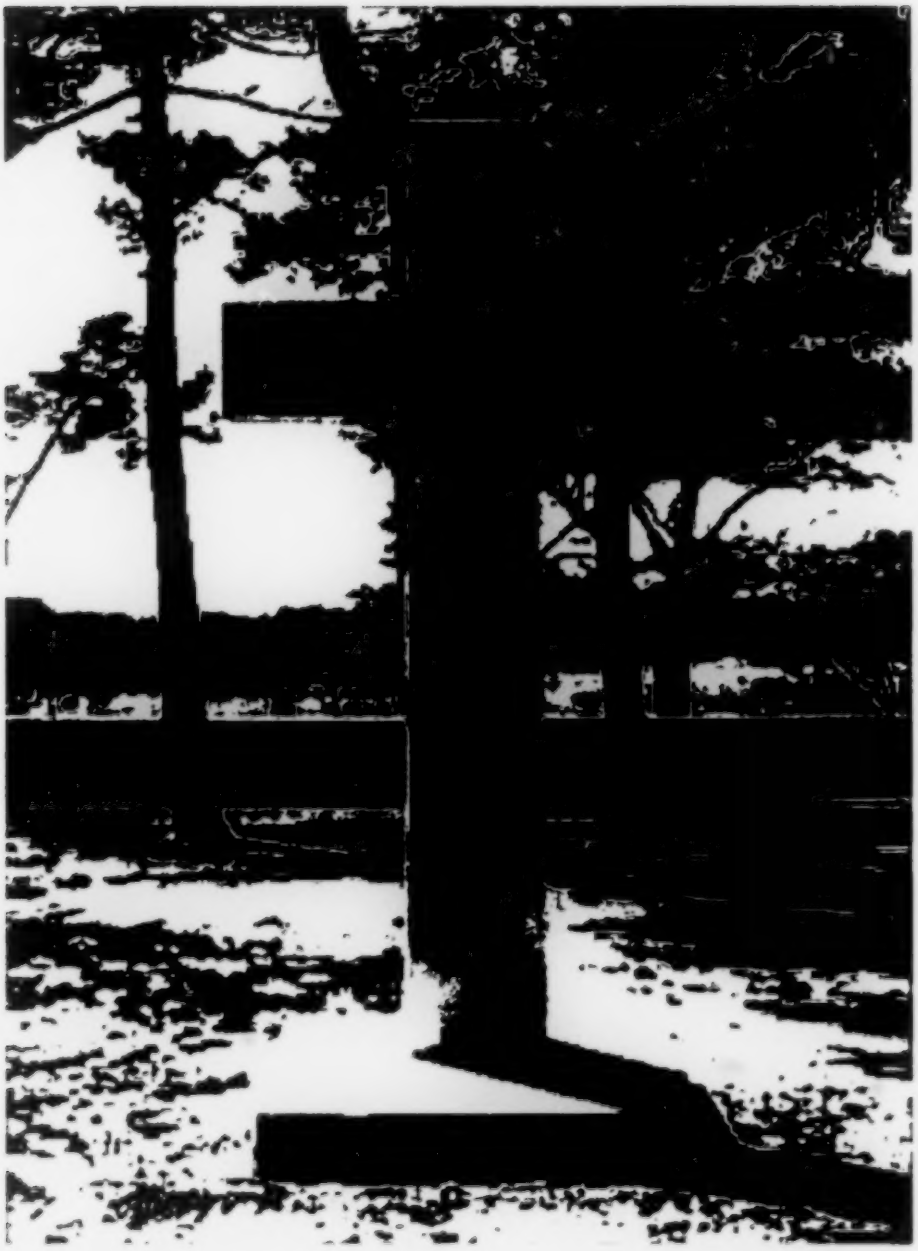
Mojave Desert Veterans Memorial, covered with a bag.
Photo by Eric Reed,
www.ericreedphoto.com.



Canadian Cross of Sacrifice,
WWI Memorial, Arlington National Cemetery,
http://www.arlingtoncemetery.net/canadian-cross.htm
(last visited June 5, 2009).



Arlington Cemetery Argonne Cross, WWI Memorial
"IN MEMORY OF OUR MEN IN FRANCE 1917 1918"
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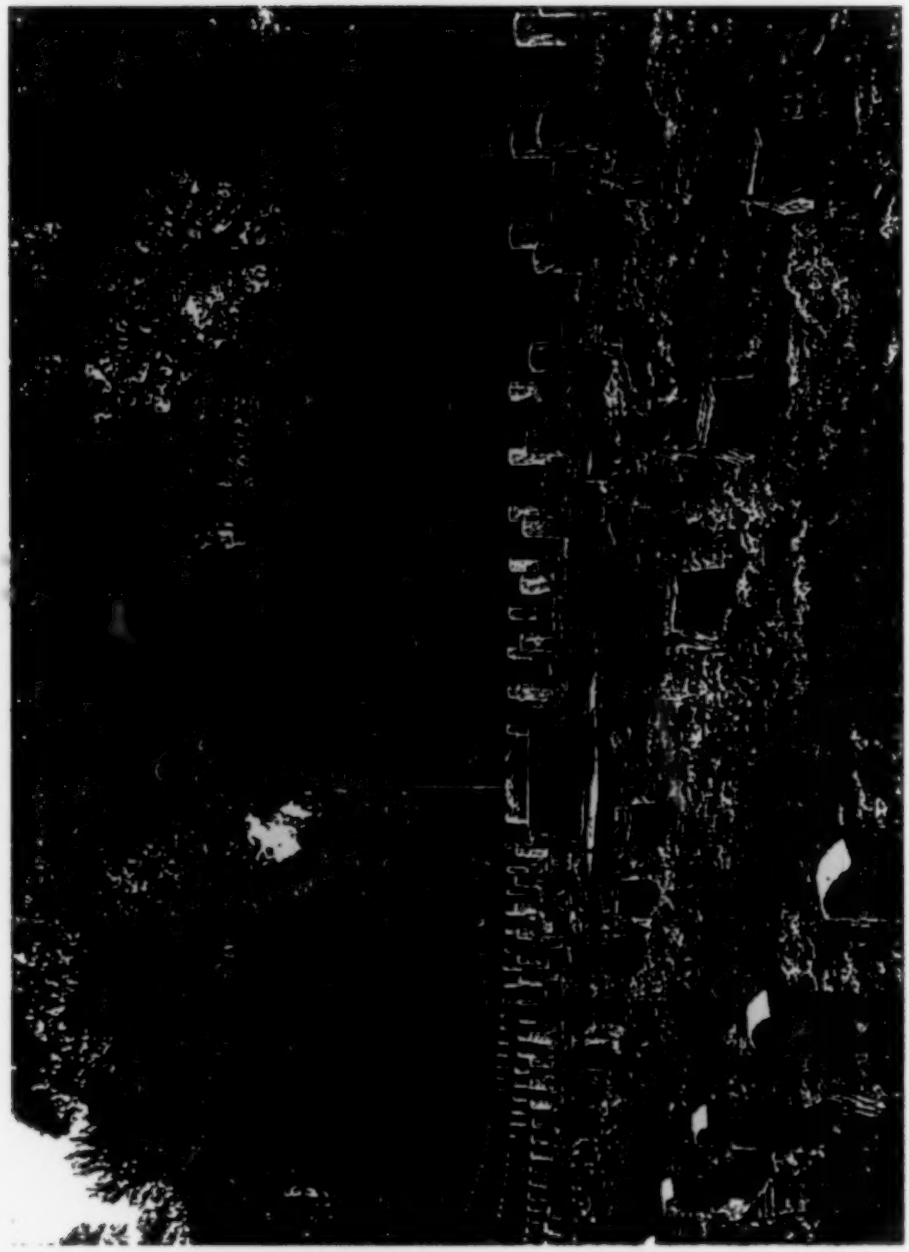
http://www.arlingtoncemetery.net/argonne-cross.htm
(last visited June 5, 2009).



French Cross Monument, WWI Memorial
Cypress Hill National Cemetery in New York

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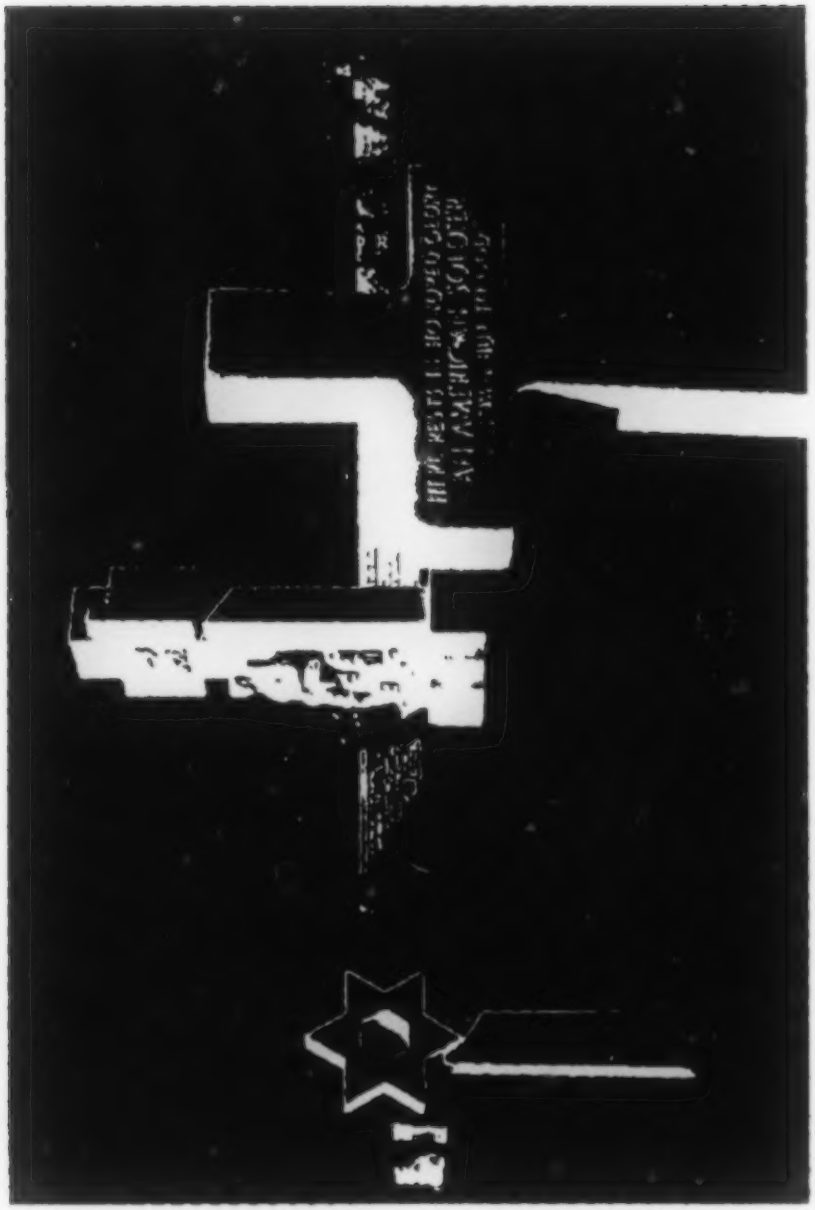

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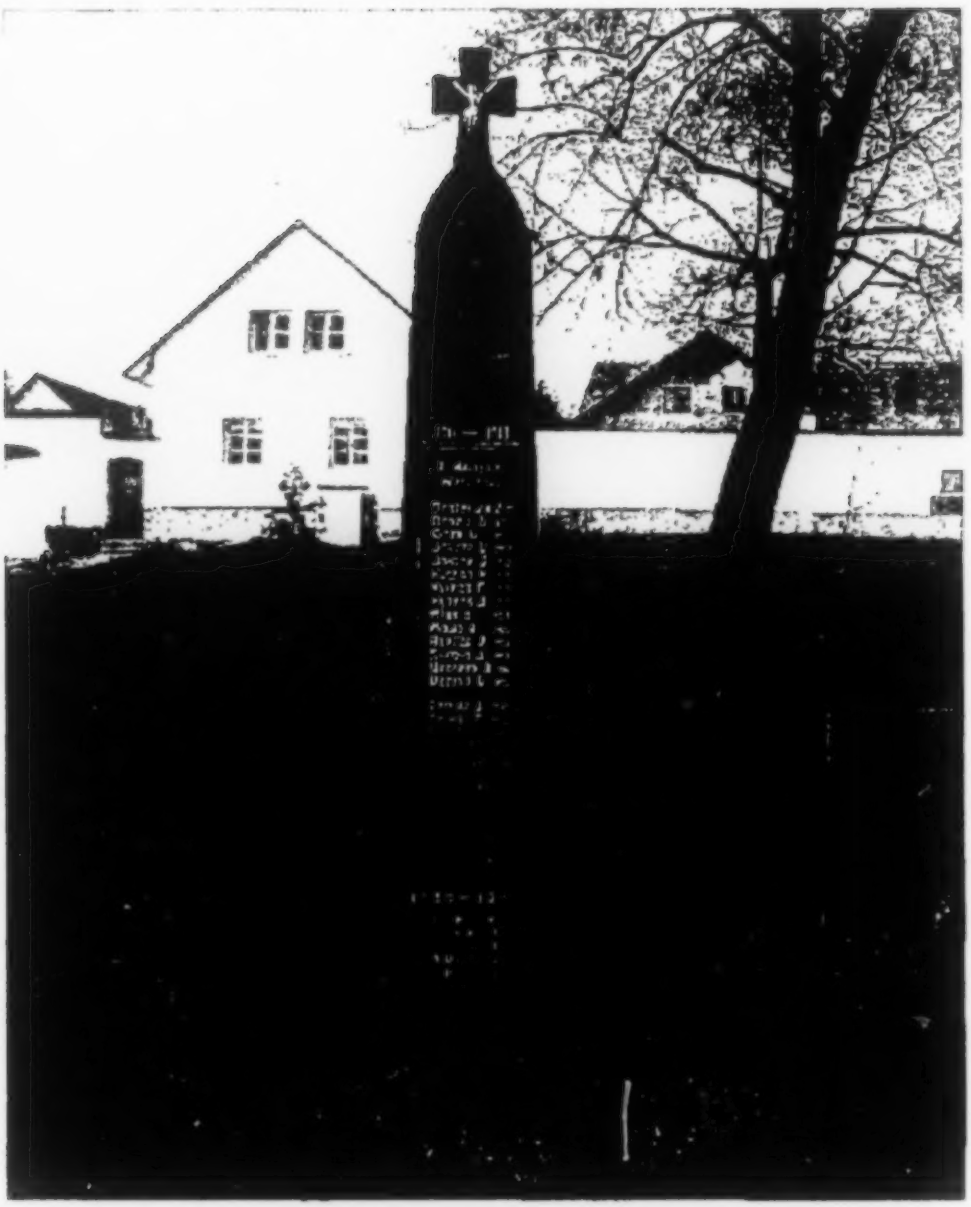

World War I Memorial
Hosin Village, Czech Republic,
http://www.waymarking.com/waymarks/WM194C_
WW_I_Memorial_Hosin_Village_Czech_Republic
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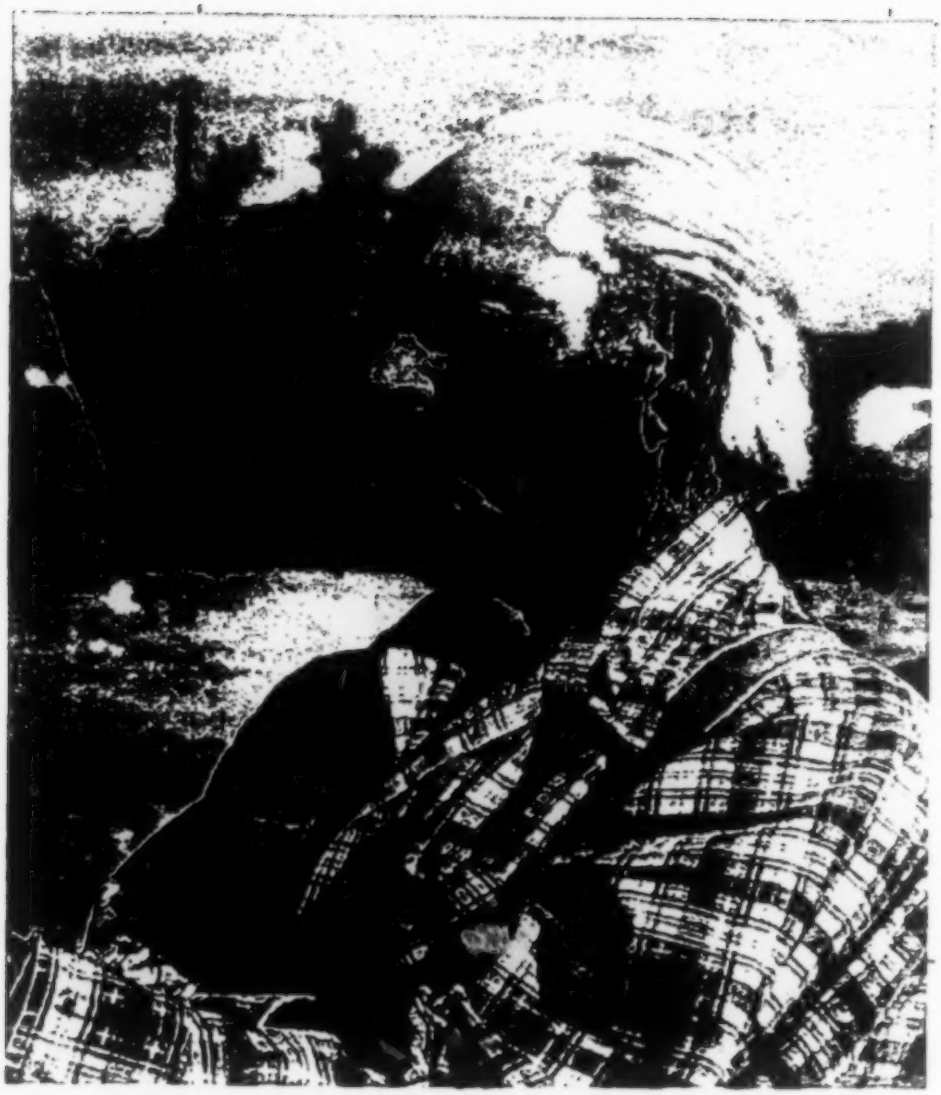
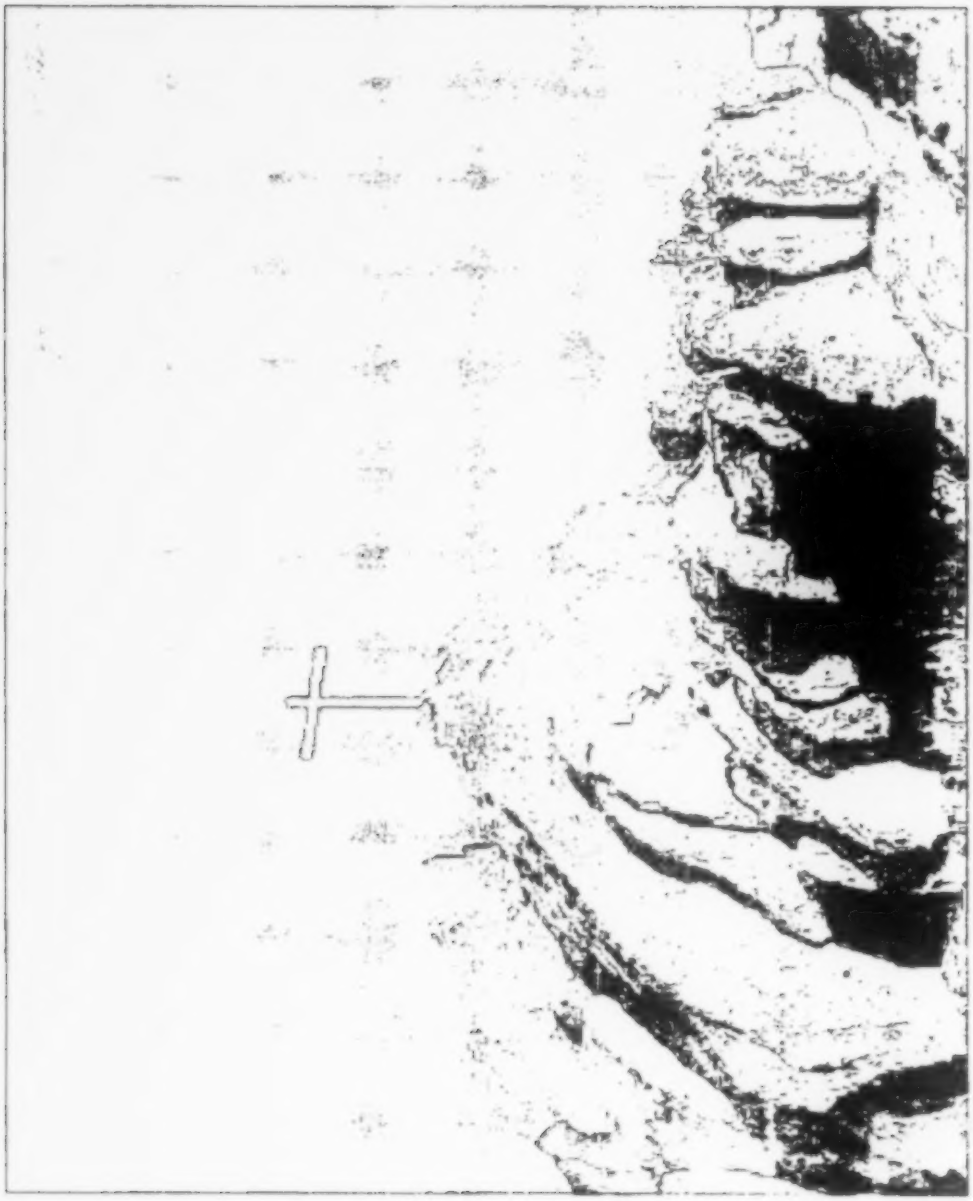
World War I Memorial in New Zealand



Riley Bembry
Photo by Dennis Casebier

Gathering of Veterans
Observing "Doughboy" Shading
circa 1934



Original Mojave Desert Veterans Memorial, http://www.nps.gov/archive/moja/adminhist/images/fig11.jpg (last visited June 5, 2009).

MANUAL OF PROCEDURE

Sec. 209 – Consolidation of Posts.

Two or more Posts may consolidate upon a vote of their respective members conducted in accordance with the procedures herein set forth as follows:

1. A motion to consider consolidation shall be made and approved at a stated meeting of the Posts.

2. A committee shall be appointed by the Post Commander to investigate consolidation.

3. All Posts involved in the consolidation shall exchange a report of all assets and liabilities.

4. A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the respective Posts, consolidate upon a two-thirds (⅔) vote of the members present and voting at each stated Post meeting.

5. The Department Commander shall be notified, in writing, immediately after the meeting of the outcome of the action taken.

6. A Department representative shall conduct a joint meeting of all Posts within thirty (30) days for the purpose of determining the name, number (must be one of the consolidating Post numbers), location of the consolidated Post and the election and installation of officers. A written notice must be sent to the members of all Posts involved at least fourteen (14) days in advance. All actions, with the exception of the election of officers,

must be approved by a two-thirds (⅔) vote of the members present at the stated meeting.

7. Such facts shall be certified by the Department representative, submitted to the Department Commander for forwarding to the Commander-in-Chief who shall issue a Certificate of Charter reciting the facts of such consolidation. The Certificate of Charter shall rank from the date of the senior Post's charter.

The property of each of the Posts shall be conveyed to and become the property of the consolidated Post. All past officers in each Post shall be entitled to rank as of date of service in their respective Posts.

Sec. 210 – Surrender of Charter.

A Post may surrender its charter in accordance with the procedures herein set forth as follows:

1. *A motion to consider surrendering a Post charter shall be made and approved at a stated meeting of the Post. If approved, the Post Commander shall immediately provide the Department Commander with a list describing all assets and liabilities of the Post.*

2. *A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the Post, vote to surrender the charter upon a two-thirds (⅔) vote of the members present and voting at a stated meeting.*

3. *The Department Commander shall be notified immediately after the meeting, in writing, of the outcome of the vote to surrender the charter of a Post. If approved, the Department Commander shall within thirty (30) days, request that the Commander-in-Chief cancel the charter. Pending such cancellation the Post shall not dispose of any assets.*

Disposition of Property. *In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, shall be immediately recovered by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.*

In case of surrender or forfeiture of a charter, the Department Council of Administration in the case of trust funds or trust property, or both, shall carry out the intent and purpose of such trust to the extent of such funds or property, or both.

Sec. 211 – Suspension and Revocation of Charter.

PODIUM EDITION

2009

VETERANS OF FOREIGN WARS OF THE UNITED STATES

[LOGO]

CONGRESSIONAL CHARTER
BY-LAWS
MANUAL OF PROCEDURE
RITUAL

As amended August 21, 2008
Effective September 20, 2008

* * *

Authorized Attendees. Any member of the Post and those on official business shall be recognized by the Post Commander for the conduct of business.

Guests. *With the approval of the Post Commander/Committee Chairman, any member or guest may attend a Post/Committee meeting. Such visiting member or guest shall have no voice unless recognized by the Post Commander/Committee Chairman, and shall have no voting privileges.*

Sec. 204

Sec. 205

Sec. 206 – Change of Location, Meeting Place, Day or Time.

A Post may change its chartered location, meeting place, meeting day or time as prescribed in Section 206 of the Manual of Procedure.

Sec. 207

Sec. 208 – Change of Name.

A Post may change its chartered name as prescribed in Section 208 of the Manual of Procedure.

Sec. 209 – Consolidation of Posts.

Two or more Posts may consolidate by authority of the Commander-in-Chief as prescribed in Section 209 of the Manual of Procedure.

Sec. 210 – Surrender of Charter.

A Post may surrender its charter only upon a vote of its members as prescribed in Section 210 of the Manual of Procedure.

Sec. 211 – Suspension and Revocation of Charter.

Actions by the Commander-in-Chief – Suspension. *The Commander-in-Chief may suspend a Post Charter for a period of up to six (6) months for violations of the National By-Laws and Manual of Procedure.*

Establishment of Trusteeship. *Upon the imposition of any suspension under this section, the Department Commander shall establish a trusteeship as prescribed in Section 211 of the Manual of Procedure.*

Actions by the Commander-in-Chief – Revocation. *The Commander-in-Chief may revoke a Post Charter.*

Actions by the Department Commander – Suspension. *The Department Commander may suspend a Post Charter for a period of up to three (3) months.*

Sec. 212 – Defunct Posts.

The Commander-in-Chief shall revoke a Post's Charter if such Post has less than ten (10) members on February 1.

In the event of such a revocation, disposition of the property and trust funds of the Post shall be handled as prescribed in Section 210.

Sec. 213 – Arrearages, Deficiencies and Omissions.

Any Post in arrears for any financial obligations to County Council (if applicable), District, Department and National for fees, dues, poppy money, supply money, failing to

* * *

VETERANS OF FOREIGN WARS OF THE UNITED STATES

May 18, 2009

RESCINDED RESCINDED RESCINDED

TO: Interested Departments

From: Kevin C. Jones, Director
Administrative Operations

SPECIAL ORDER NO. 392

Upon the recommendation of the Commander, Department of California, that portion of Special Order No. 197, dated May 7, 2007 announcing the cancellation of Barstow Home Post No. 385, is hereby rescinded and the Post restored to good working order.

By order of
Glen M. Gardner, Jr.
Commander-in-Chief

OFFICIAL:

/s/ Allen "Gunner" Kent
Allen "Gunner" Kent
Adjutant General

Distribution:

Post Commander (Through Channels)
Department Headquarters
Ladies Auxiliary
National Veterans Service
Adjutant General
Quartermaster General
File

[Address And Phone Numbers Omitted In Printing]

AMICUS CURIAE BRIEF

No. 08-472

In The

Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

FRANK M. BUONO,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN MUSLIM ARMED FORCES AND VETERANS AFFAIRS COUNCIL, AND THE MUSLIM AMERICAN VETERANS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The American Muslim Armed Forces and Veterans Council, and the Muslim American Veterans Association, are the two largest organizations comprised exclusively of Muslims who have served in the armed forces of the United States. These amici work actively to promote the welfare of Muslims in the armed forces and of Muslim veterans. They also seek to spread the word to all Americans that there is a patriotic community of Muslim Americans who love their country, and a proportionate share of young Muslim American men and women who serve their country in its military.

These amici are concerned about this case for the simple reason that a memorial to American veterans should be a memorial to all American veterans, not just to Christian veterans. The casual use of the Christian cross to honor our nation's war dead reflects the erroneous assumption that our military is comprised exclusively of Christians, or that the exceptions are not important enough to count. But Muslim soldiers, sailors, marines, and airmen risk their lives and sometimes die for their country, just as Christians do. The VFW can do what it chooses in a wholly private display. But the government cannot sponsor, promote, or facilitate a memorial that honors only Christian veterans. [1]

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[1] No one other than the amici and their counsel authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

American Muslims have fought in every American war, beginning with the Revolution. They have fought in substantial and increasing numbers in the wars of the last century, from World War I to Iraq and Afghanistan. Meanwhile, the Christian majority in the general population has declined to 76% in the largest surveys.

While the government does not formally argue the constitutionality of a government-sponsored cross, it repeatedly suggests that maybe there was no constitutional violation here. But a government-sponsored cross plainly takes sides between faiths. The cross symbolizes the central Christian story of Jesus's death and resurrection. The cross's secondary meaning to honor the Christian dead is directly derived from, and wholly dependent on, that primary religious meaning. The cross symbolizes a promise of eternal life to Christians, but also a threat of eternal punishment to non-Christians.

To hold that government cannot sponsor an isolated and freestanding cross does not imply the removal of all crosses from government cemeteries. Privately chosen religious symbols on individual headstones are plainly constitutional. Larger crosses would be constitutional if accompanied by comparably prominent symbols to honor deceased veterans of other faiths. And even without that, the symbols of other faiths on individual headstones make larger crosses in cemeteries potentially distinguishable from this case.

The government's obligation to be neutral between competing claims to religious truth is deeply rooted in the original understanding. A

narrow statement of the principle that drove decisions concerning disestablishment of religion is that government should stay out of religious controversies. What is religiously controversial has changed over time as religious diversity has increased.

Plaintiff's standing, and the unconstitutionality of the cross at Sunrise Rock as it has been displayed heretofore, are res judicata. Plaintiff's res judicata argument is further supported by all of this Court's cases on modification of injunctions. The civil-contempt exception to the collateral bar rule is not an exception to res judicata; the collateral bar rule is a separate doctrine, directed to interlocutory orders.

Quite apart from res judicata, plaintiff has standing. The government's argument that he does not is based on a tendentious misreading of his Declaration and on a misunderstanding of the Establishment Clause. Plaintiff's objection is to government sponsorship of a cross, not to the denial of third-party free-speech claims. His Declaration simply recognizes that a public forum would negate government sponsorship. There is a long tradition of Americans opposing government sponsorship of their own religion, going back to those who successfully demanded disestablishment.

Giving Congressional motivations every benefit of the doubt, Congress has attempted to remedy the constitutional violation in this case by privatizing the cross. But its effort is incomplete. Religious speech is private for Establishment Clause purposes only if government does nothing to promote it or prefer it. A remedy for the constitutional violation must completely eliminate the violation and its effects.

These principles mean that a remedy in this case must eliminate all vestiges of government sponsorship of the cross, eliminate preferential treatment for the VFW and the Sandozes, and make privatization unambiguously visible on the ground. The proposed Congressional remedy does none of these things. The injunction against implementing that remedy should be affirmed, so that on remand, either the cross can be removed or a complete and effectual privatization remedy can be implemented.

ARGUMENT

I. The Christian Cross Is Not a Memorial to All American Veterans.

A. The American Military Has Long Included Many Muslims and Other Non-Christians.

On October 19, 2008, General Colin Powell spoke on *Meet the Press* about the Presidential election. Addressing the persistent rumors that Senator Obama was Muslim, General Powell said the rumors were false, but that "the really right answer is, what if he is? Is there something wrong with being Muslim in this country? The answer's no, that's not America." And he continued:

> I feel strongly about this particular point because of a picture I saw in a magazine. It was a photo essay about troops who are serving in Iraq and Afghanistan. And one picture at the tail end of this photo essay was

> of a mother in Arlington Cemetery, and she had her head on the headstone of her son's grave. And as the picture focused in, you could see the writing on the headstone. And it gave his awards—Purple Heart, Bronze Star—showed that he died in Iraq, gave his date of birth, date of death. He was 20 years old. And then, at the very top of the headstone, it didn't have a Christian cross, it didn't have the Star of David, it had crescent and a star of the Islamic faith. And his name was Kareem Rashad Sultan Khan, and he was an American. He was born in New Jersey. He was 14 years old at the time of 9/11, and he waited until he can go serve his country, and he gave his life.

Meet the Press Transcript for Oct. 19, 2008, at 2.[2]

Kareem Rashad Sultan Khan is one of many Muslim Americans who have served their country in the United States military. As of 2006, "some 3,500 Muslims ha[d] been deployed to Iraq and Afghanistan with the United States armed forces, military figures show. Seven of them ha[d] been killed, and 212 ha[d] been awarded Combat Action Ribbons." Andrea Elliott, *Sorting Out Life as Muslims and Marines*, N.Y. Times (Aug. 7, 2006).[3]

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[2] Available at www.msnbc.msn.com/id/27266223/page/2/. For the photograph, see *Portfolio by Platon, Service*, The New Yorker 48, 59 (Sept. 29, 2008), available at http://archives.newyorker.com/?i=2008-09-29#folio=058 (free to subscribers; for purchase by others). The individual photograph is available free at http://current.com/items/89427578_service-colin-powell-muslim-soldier-reference-on-meet-the-press.htm.

[3] Available on Westlaw at 2006 WLNR 13604946.

For accounts of other Muslim veterans of Iraq who are buried at Arlington, see Shahed Amanullah, *Crescents Among the Crosses at Arlington Cemetery* (May 30, 2005).[4]

Research on Muslims in the American military is scattered and incomplete, but the basic facts are common ground. The plaintiff, the government, and these amici all agree that Muslims serve in substantial numbers today and that they have served in every American war, beginning with the Revolution. As a State Department publication summarizes, "Muslim Americans have served with distinction in all U.S. wars." U.S. Dept. of State, Bureau of International Information Programs, *Being Muslim in America* 56 (2008).[5] The known part of the story begins with Peter Salem (or Saleem), a freed slave who fought "in the Battle of Bunker Hill and throughout the American Revolution." *Id.* Like many Africans brought to America as slaves, Salem was a Muslim.

A recent search of government records revealed additional Revolutionary soldiers with Muslim surnames, several in the War of 1812, and many more in the Civil War. Amir N. Muhammad, *Muslim Veterans of American Wars* 14–23 (2007). Muhammad found hundreds of Muslim surnames in the draft and enlistment records of World War I, *id.* at 24–62, and World War II, *id.* at 63–168. There are problems with the documentation and internal consistency of Muhammad's scholarship; he searched for only 99 surnames, so many Muslims would be omitted; and some of the names he searched for are

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[4] Available at www.altmuslim.com/a/a/b/1986/.

[5] Available at www.america.gov/media/pdf/books/being-muslim-in-America.pdf.

not exclusively Muslim. So we do not rely on his research for specific numbers. But he provides illustrative detail for the government's more conclusory statement that Muslim Americans have fought in each of America's wars. And he found hundreds of men and women with Muslim surnames buried in national military cemeteries around the country. *Id.* at 169–222.

Thousands of Muslims serve in the American military today, but the precise number is unknown. Official figures are based on an optional question on enlistment forms, and many Muslims leave that question blank. The government reported 3,386 Muslims in 2006. Richard Whittle, *Uncle Sam Wants US Muslims to Serve*, Christian Science Monitor (Dec. 27, 2006).[6] But at about the same time, the military reported that more than that had served just in Iraq and Afghanistan. Elliott, *supra* at note 3. These amici believe the real number is substantially higher. The most commonly reported estimate is 15,000. *See, e.g.*, Whittle, *supra* at note 6; Amanullah, *supra* note at 4; Linda D. Kozaryn, *U.S. Air Force Capt. Muhammad: A Muslim American*, American Forces Press Service (Dec. 11, 2002).[7] But these amici and their counsel have not been able to discover the original basis for this estimate.

Whatever the real number, the military wants more. It has created Muslim prayer rooms at the

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[6] Available at www.csmonitor.com/2006/1227/p03s01-usmi.html. Whittle reports this as based on a "survey," but the precision of the number (3,386) suggests an individual count rather than a survey. Amici believe that this number is derived from the enlistment forms.

[7] Available at www.defenselink.mil/news/newsarticle.aspx?id=42398.

service academies and on military bases, appointed Muslim chaplains, accommodated Ramadan, and taken other steps to recruit Muslims. Whittle, *supra* at note 6. With wars in the Middle East and a battle for the hearts and minds of Muslims, the military needs more men and women who understand Muslim cultures, and more who speak Arabic and other Middle Eastern languages. *Id.*

Muslims are only one of many non-Christian religious minority groups comprising many millions of Americans. The best data on the population come from the American Religious Identification Survey, which surveyed enormous numbers of Americans in 1990,[8] 2001,[9] and 2008. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey Summary Report* (2009).[10]

The 2008 survey interviewed 54,461 respondents, which reduces the statistical margin of error to less than 1/2 of 1%. *Id.* at 2. This survey found that only 76% of Americans now say that their religion is Christian or any more specific group identifiable as Christian. *Id.* at 3 tbl. 1.[11]

Of course 76% is a large supermajority. But 24% is a huge minority, especially for purposes of deciding about individual rights. The Census Bureau's current population estimate is approaching 307 million;[12] 24% of that number means that more

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[8] Barry A. Kosmin & Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* (1993).

[9] Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market: Religious and Non-Religious Americans* (2006).

[10] Available at www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

[11] More detailed data are reported *id.* at 5 tbl. 3, 23 App. A.

[12] U.S. Census Bureau, *Population Clocks*, available on the Bureau's home page at www.census.gov.

than 73 million Americans do not describe themselves as Christians.[13]

B. The Christian Cross Is a Uniquely Sectarian Symbol that Cannot Memorialize Muslim Veterans.

The government has not presented the question whether the cross is constitutional if sponsored by the government, but the government repeatedly suggests that the Court consider the adequacy of the Congressional remedy on the assumption that the cross may have been constitutional all along.

Thus, the government says that many people view the cross "as a symbol of the sacrifices of fallen soldiers," contrasting this characterization with Mr. Buono's view that the cross is "a religious symbol." Pet. Br. 28. The government compares the cross to the Ten Commandments display in *Van Orden v. Perry*, 545 U.S. 677 (2005), and claims that the cross "communicates a secular message." Pet. Br. 29. The government even claims that the cross has "a *predominantly* secular message." *Id.* at 29 (emphasis added). The government contrasts the cross with the "patently religious" object of the ordinance in *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005), implying that the government's purpose in preferentially permitting erection of a Christian cross was somehow not patently religious. Pet. Br. 36.

These claims are false. There is no ambiguity about the primary meaning of a Christian cross. The

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[13] The somewhat smaller absolute numbers reported in Kosmin and Keysar (2009) are the numbers of adults.

cross is *the* central symbol of *the* central theological claim of Christianity: that the son of God died on the cross to redeem the sins of human kind, that he rose from the dead, and that those who believe in him will also rise from the dead and have eternal life.

All the secondary meanings to which the Christian cross has been put are derived from, and dependent on, this primary meaning. The secondary meanings would make no sense without the primary meaning. Why does the cross honor deceased Christian soldiers? Because it symbolizes the promise that they will rise from the dead and live forever. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross.

The cross is not at all like the Ten Commandments. The Ten Commandments are a sacred text, but this text contains prohibitions on murder, theft, perjury, and defamation—secular wrongs that are prohibited in the legal code of every civilization. "Thou shalt not kill" has intelligible secular meaning that does not depend upon the purely religious duties with which it is bracketed or the divine source to which it is attributed. *See Van Orden*, 545 U.S. at 690 (plurality opinion); *id.* at 701 (Breyer, J., concurring). But the Christian cross has no meaning not derived from its primary religious meaning.

Moreover, the Ten Commandments are sacred to all three of the Abrahamic religions. *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting). But the cross is sacred only to Christians; it is a symbol only of Christianity.

Justice Scalia has defended government sponsorship of religion as strongly as any Justice, and more strongly than most. Yet twice he has said that this support must be interfaith. It must be confined to what the three Abrahamic faiths have in common, *see id.* at 893–94; it must exclude "details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Justice Thomas and Chief Justice Rehnquist joined each of these opinions.

The cross fails each of Justice Scalia's tests. It is unique to Christianity, not common to the three Abrahamic religions, let alone all monotheistic religions. Its power as a symbol, and the story it symbolizes, are entirely dependent on the divinity of Jesus. The divinity of Jesus is an explicit, central, and essential element of the Christian story of the cross. The promise of resurrection and eternal life is what makes the cross a symbol that honors deceased Christian soldiers, and that promise necessarily depends on the divinity of Jesus. But "our constitutional tradition" has "ruled out of order" such sectarian endorsements of religion. *Id.*

The cross and its story are not merely neutral or irrelevant to non-Christian soldiers; they are profoundly negative. These amici respect our Christian brothers in arms, and we respect their faith. But the inescapable fact is that Christianity and Islam make exclusive claims to truth, and these claims are mutually inconsistent. To Christians, the story of the cross offers an extraordinary promise: Christian soldiers will be "saved" (John 3:17, KJV) through the cross, resurrected from the dead, and

eternally rewarded. But to non-Christians, the cross offers an equally extraordinary threat. According to the central Christian claim that is symbolized by the cross, Muslim soldiers, and other non-Christians, outside the saving grace of the cross, will be eternally damned.

The promise to Christians is capsulized in a Bible verse much publicized by evangelical Christians:

> For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.

John 3:16 (KJV). The negative pregnant in this promise is made explicit two verses later (and in many other New Testament passages):

> He that believeth on him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God.

John 3:18 (KJV).

The threat of the cross is inseparable from the use of the cross to honor the Christian dead. The cross is an appropriate symbol for Christian dead because it promises resurrection and eternal life. But that promise is only to some, and it is paired with a threat of condemnation to all others. Christians have disagreed over the centuries about how this sorting process works—predestination, a "personal decision" for Jesus, faithful and sincere performance of sacramental obligations, and other theories—but those disagreements do not affect the

central point. On any version of Christian theology, some humans get the promise, and other humans get the threat.

To note these things about the cross is not to attack Christianity, but to take it seriously. Muslim teachings on reward and punishment in the afterlife are different in important ways, but similar in insisting on belief in religious truth. Islam predicts harsh consequences for those who do not believe in Islam, just as Christianity predicts harsh consequences for those who do not believe in Christianity. Adherents of the two faiths can be tolerant and respectful of each other in this world; they can share their common identity as Americans, or as proud members of the American military. But it is simply a fact that each faith predicts a bad end for adherents of the other.

Non-Christians do not *fear* the threat of the cross, because they do not believe the Christian story. But that does not justify government promotion of the principal symbol of both the promise and the threat. A government-sponsored cross inherently takes sides between competing claims to religious truth. It says that Christian teachings about the afterlife are true, and that Muslim and other teachings about the afterlife are therefore, necessarily, false.

The government dismisses the primary meaning of the cross as irrelevant, on the ground that any monument can be interpreted "in a variety of ways." Pet. Br. 39, quoting *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1135 (2009). No doubt an ambiguous text or symbol can be subject to more than one interpretation. But surely the Court in *Summum* did not commit itself to a post-modernist world in which no text or symbol has any core

meaning and any text can mean any thing. When a symbol has a primary meaning so fundamental, of such longstanding, and so universally known, as the Christian cross, government cannot display the symbol and plausibly disclaim the primary meaning. When the allegedly secular secondary meaning is wholly derivative from the primary religious meaning, government cannot embrace the secondary meaning without embracing the primary meaning on which the secondary meaning depends. If government can sponsor a Christian cross and deny that it has done anything religious, then words and symbols have no meaning and the Court has consigned the Establishment Clause to the world of *Alice in Wonderland*.

If a Christian cross has sufficient secular meaning to fall outside the Establishment Clause, then so might a sectarian prayer. Some might interpret the prayer as a meditation, some as a prose poem, and still others as a metaphor, and some might view the prayer as "[r]eligious symbolism . . . with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges." *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J. dissenting). Especially if the prayer includes some secular message or request, there is no limit under the government's theory. If the message of the cross is "predominantly secular," why not "Jesus save the United States and this Honorable Court"? The Court would disserve both religion and the Constitution if it accepted the government's argument that even the most profoundly religious symbols can be treated as secular.

Congress has been inconsistent about who or what the cross is supposed to memorialize. The original plaque said the cross was "Erected in Memory of the Dead of All Wars." Pet. App. 56a. Federal legislation directs that this plaque should be restored. Pub. L. No. 107–117, §8137(c), Jt. App. 44. But the same Act says that the cross and surrounding land "are a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." *Id.* at §8137(a).

Whether it is all veterans or only those who died, and whether it is all wars or only World War I, the group to be honored and commemorated includes Muslims, believers in many other faiths, and people who believe in no religion. But the symbol chosen commemorates only Christians. When this Court considers whether the adjudicated constitutional violation in this case has been completely remedied, its analysis should not be distorted by the government's efforts to minimize the violation.

C. The Unconstitutionality of the Cross at Sunrise Rock Does Not Imply the Unconstitutionality of Every Cross in Every Government Cemetery.

A recurring argument in defense of government promoting religious viewpoints is the claim that government has always done it. We are often told that political rhetoric in the founding generation invoked God, and in this case, amicus briefs supporting the government offer pictures of crosses (several of them entirely foreign) in military cemeteries.

Some of these crosses are constitutionally unobjectionable, even praiseworthy. The crosses on the headstones, or used as headstones, on military graves in government cemeteries are chosen by individual veterans or their families, and the government offers a wide range of symbols for use by veterans of other faiths. These privately selected religious symbols on individual graves are best understood as the private speech of each veteran.

Whether in such a cemetery there can also be a large, dominant cross in honor of Christian veterans collectively is a harder question, but one not presented by this case. The government might say that such a cross honors the majority of veterans, and that the veterans of religious minority groups are sufficiently honored by symbols of their own choice on individual headstones. These amici believe that such a freestanding cross for Christian veterans collectively should be accompanied by equally prominent collective monuments for adherents of other faiths. But the Court need not decide that question here.

Either way, the unconstitutionality of the cross on Sunrise Rock does not logically lead to the removal of all crosses from all government cemeteries. One important function of religion is to address the inevitability of death, and a cemetery is an appropriate place to express the religious faiths of those buried there. Without some such ability to express their faith, many Americans would find government cemeteries unusable. These amici do not object to religious symbols in cemeteries, but to the inequality of singling out only Christians for collective memorialization.

Sunrise Rock is not a cemetery, there are no individual headstones with symbols of many faiths, and the government has refused to permit the symbols of any faith other than Christianity. Pet. App. 4a-5a. There is no way this display can be understood as a neutral recognition of veterans of all faiths.

What is at issue in this case is a large, permanent, and freestanding cross, isolated from the symbol of any other faith and from any secular symbol. For government to sponsor such a cross is for government to promote the Christian story of the cross. And that is inconsistent with the core principles of the Establishment Clause, as this Court unanimously recognized in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). *See id.* at 599 (opinion of the Court) (even a temporary cross at Easter on the grand staircase of the courthouse would convey "endorsement of Christianity"); *id.* at 661 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and White and Scalia, JJ.) ("the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall").

II. Government's Obligation to Remain Neutral Between Competing Religious Claims Is Deeply Rooted in the Original Understanding.

Many of the colonies, and some of the states, had formally established churches, all of which were disestablished over a sixty-year period from the 1770s to 1833. The federal Establishment Clause was the consequence of this movement, not the cause; those who sought disestablishment in their

own states also wanted to prevent any establishment at the federal level. For a detailed historical review of this process of disestablishment, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385.

The nation was overwhelmingly Protestant in this period, so the debate over disestablishment focused on issues that were controversial among Protestants. First and foremost was how to finance the church. The established churches depended on tax support and sought to keep it. The dissenting churches opposed tax support for churches, and they continued to oppose it even when the established churches offered tax support to all denominations equally, as in the general assessment bill in Virginia. *See, e.g.*, Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776–1787*, at 143, 175 (1977). As the dissenting churches won this battle in state after state, it became settled that government should not financially support the church.

A debate over the government's role in religious doctrine was closely related to the debate over funding. The equality of all denominations implied not only that government should not tax to support its preferred denomination, but also that government should not choose a preferred denomination in the first place.

This much seems to have been universally accepted. The *narrowest* proposals for what became the Establishment Clause would have prohibited establishing "one religious sect or society in preference to others," "any particular denomination of religion in preference to another," or "articles of

faith or a mode of worship." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 880–81 (1986). And after tax support for churches had been repealed, dissenters continued to object to any sign of government preference for the formerly tax-supported churches. Baptists and Presbyterians denounced the Virginia law incorporating the Episcopal Church as giving that church "Peculiar distinctions" and "the particular sanction of and Direction of your Honourable House." Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. L. Rev. 37, 43–44 (1991).

What religions should teach, and what individuals should believe, was to be left to churches and individual conscience. The religious dissenters who demanded disestablishment emphasized that true religious faith must be voluntary, not directed by the state. Professor Esbeck summarizes their principle as voluntaryism, a word that was in use at the time. Esbeck, 2004 BYU L. Rev. at 1395–96 & n.24.

But the early generations were slow to apply these principles to generic nonfinancial support of Protestant Christianity. So we find the oft-cited religious rhetoric in the speeches of political leaders. This proves little, because these leaders were of course free to speak in their individual as well as their governmental capacities. Far more telling, we find Protestant religious instruction in the public schools. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297–305 (2001). In the mid-nineteenth century, we find Catholic children

beaten, or expelled from school, for refusing to read the Protestant translation of the Bible. *Donahoe v. Richards*, 38 Me. 376 (1854); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859). We find blasphemy prosecutions surviving well past the period of formal disestablishment. *See Commonwealth v. Kneeland*, 37 Mass. 206 (1838); *State v. Chandler*, 2 Harr. (Del.) 553 (1837); *Updegraph v. Commonwealth*, 11 Serg. & Rawl. 394 (Pa. 1824); *People v. Ruggles*, 8 Johns (N.Y.) 290 (1811). The de facto principle was neither nonpreferentialism nor noncoercion. The de facto principle was that if a practice was not controversial among Protestants, it was not a problem.

There are multiple ways to view this history. One is to abandon any search for principle and simply say that if early American generations did it, it must be constitutional. This would allow Christians to prosecute Muslims for blasphemy and punish Muslim school children for refusing to recite the Christian catechism.

But if we search for principle, what is the principle? Focusing on voluntaryism as the principle, Professor Esbeck says that "practice lagged behind principle," but that "over a century and a half the practice would mature and fill out to meet the principle." Esbeck, 2004 BYU L. Rev. at 1400. That is an accurate characterization.

A narrower statement of the principle is that government should stay out of religious controversies. This principle better fits the practice of the founding era, when government was excluded from anything that was religiously controversial among Americans. But the only significant religious controversies among Americans in that period were

controversies among Protestants. Other faiths were simply not numerous enough, or important enough, to create a controversy that would be taken seriously. Laycock, 27 Wm. & Mary. L. Rev. at 917–18.

This narrower principle has remained the same, but the facts to which the principle applies have changed. The large Catholic immigration, beginning in the second quarter of the nineteenth century, created an enormous controversy over religious instruction in the public schools. Jeffries & Ryan, 100 Mich. L. Rev. at 299–305; Laycock, 26 Val. L. Rev. at 50–53. This controversy produced mob violence and church burnings in Eastern cities, a proposed constitutional amendment, and a major political issue that recurred for decades. *Id.* at 51–52 (collecting sources). Under changed social conditions, religious instruction in the public schools inflicted precisely "those consequences which the Framers deeply feared." *School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of keeping government out of religious controversies now meant that government should not teach religion in the public schools.

Deeply rooted anti-Catholicism meant that it took a long time for Americans to recognize this new application of their constitutional principle. But very slowly, beginning in the late nineteenth century, state courts and local boards of education began removing religious observances from the public schools. *See State ex rel. Weiss v. District Board*, 44 N.W. 967 (Wis. 1890); *Board of Education v. Minor*, 23 Ohio St. 211 (1872).

The Catholic immigration was followed by Jewish immigration, Muslim immigration, and other

immigration streams from around the world, and now by a large increase in the number of Americans with no religion. Things that were uncontroversial in a world dominated by Protestants, or by Christians, become controversial when a quarter of the population is no longer Christian. But the principle remains the same: government should not take sides in religious controversies

The cross takes sides in one of the most fundamental of religious controversies. The cross makes no sense as a way of honoring the dead unless Christianity is true. We can understand historically why the government might have erected crosses after World War I, when the de facto Protestant establishment still prevailed, when Jews were largely confined to urban slums, and when Muslims were a small and largely invisible minority. But the apparent lack of controversy was illusory, reflecting disregard of religious minorities too small, too poor, and too weak to make themselves heard.

When this Court says that government should be neutral towards religion, and when the most conservative Justices agree that government should be neutral with respect to those points on which the three Abrahamic religions disagree, the Court and its members are invoking the founding principle that government should stay neutral in religious controversies. That principle applies to the cross on Sunrise Rock. Either the cross must be removed, or it must be fully and effectively privatized, or government must provide equal access for non-Christians.

III. The Surrounding Law of Injunctions Gives Additional Support to the Rules That Prevent the Government from Relitigating Issues Determined in *Buono I*.

As explained in plaintiff's brief, plaintiff's standing and the constitutionality of government sponsorship of the cross at Sunrise Rock were determined by a final judgment in 2004. *Buono I*, Pet. App. 100a. Those issues cannot be relitigated now, either on Mr. Buono's motion to enforce the injunction or on the government's implicit motion to modify the injunction on the ground that Congress has provided a complete alternative remedy. Relitigation of either issue is *jurisdictionally* barred by the long-expired time limit on petitions for certiorari, and *substantively* barred by res judicata. See Resp. Br. 11–18, 33 and cases cited; *see also United States v. Rylander*, 460 U.S. 752, 756–57 (1983).

In addition to these explicit applications of res judicata in injunction cases, the Court unanimously applied res judicata to a permanent injunction entered by consent in *Frew v. Hawkins*, 540 U.S. 431 (2004). Defendants argued that the Eleventh Amendment barred enforcement of the injunction to the extent that it required more than the underlying statutory right on which the injunction was based, and therefore, that they were entitled to relitigate the meaning of their statutory obligation on plaintiff's motion to enforce. The Court disagreed. The Court focused on the Eleventh Amendment and did not mention res judicata, but the res judicata effect of the consent decree was the obvious premise of the opinion. Like the more explicit res judicata

cases cited in plaintiff's brief, *Frew* holds that a final judgment of injunction cannot be relitigated on a motion to enforce it.

In addition, all the cases on modification of permanent injunctions are based on the premise that a permanent injunction is res judicata. If permanent injunctions were not res judicata, they could be modified at will. It is only because permanent injunctions *are* res judicata that some change in law or fact is required to support their modification under Rule 60(b)(5). "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests . . ." *Horne v. Flores*, 129 S.Ct. 2579, 2593 (2009). "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). "A motion for relief from judgment under Rule 60(b) . . . does not toll the time for appeal from, or affect the finality of, the original judgment." *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Rather than a chance to relitigate, Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne*, 129 S.Ct. at 2593, quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); *accord*, *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *id.* at 257 (Ginsburg, J., dissenting) ("relitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom.")

The government's argument here is functionally equivalent to a motion to modify the injunction in *Buono I*, which prohibits it from "permitting the display of the Latin cross in the area of Sunrise Rock . . ." Pet App. 146a. On such a motion, "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." *Horne*, 129 S.Ct. at 2593. The only alleged change is Congress's attempt to privatize the cross.

The question whether that attempt is a sufficient change to justify modifying the original injunction resolves into the question whether Congress has actually remedied the adjudicated constitutional violation. As the Court said in *Horne*, "If petitioners are ultimately granted relief from the judgment, it will be because they have shown that the Nogales School District is doing exactly what this statute requires." 129 S.Ct. at 2607. Similarly here, if Congress has done "exactly what" the Establishment Clause requires, the original injunction can be vacated or modified. But if Congress has not completely remedied the original violation, then the government is not yet entitled to relief from the judgment.

Finally, to avoid any risk of confusion, we should explain how the res judicata effect of injunctions fits with the collateral bar rule. "[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). Consequently, one cannot defend against a charge of criminal contempt by arguing that the injunction was erroneously issued. This rule has come to be known as the collateral bar rule. *See Tory*

v. Cochran, 544 U.S. 734, 739 (2005); 1 Dan B. Dobbs, *Law of Remedies* §2.8(6) at 213–18 (2d. ed. 1993); Douglas Laycock, *Modern American Remedies* 812–28 (3d ed. 2002).

The domain of the collateral bar rule is injunctions still subject to appeal. *See Walker v. Birmingham*, 388 U.S. 307, 309, 319 (1967) (temporary injunction without notice); *In re Green*, 369 U.S. 689, 690 (1962) (restraining order without notice); *Mine Workers*, 330 U.S. at 266–67 (temporary restraining order without notice). Because the judgments in such cases are not final, res judicata does not apply, and the collateral bar rule has been thought necessary to protect the court's authority to prevent irreparable injury pending further litigation. Once an injunction becomes completely final, res judicata prevents relitigation, and the collateral bar rule becomes unnecessary, either inapplicable or redundant.[14]

Distinguishing res judicata from the collateral bar rule matters, because the collateral bar rule does not apply to civil contempt. The Court was quite clear about this in *Mine Workers*, 330 U.S. at 294–95. This statement, in the context of a leading case about the collateral bar rule, applies only to that rule. It does not limit this Court's many holdings, before and since, that a final judgment of permanent

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[14] In *Howat v. Kansas*, 258 U.S. 181 (1922), the Kansas court had applied the collateral bar rule to a permanent injunction. The facts are not clear, but the time for appeal may have elapsed. *See State v. Howat*, 198 P. 686, 688 (Kan. 1921) (complaint filed in April 1920, permanent injunction issued on date not stated, injunction violated in February 1921). If the time for appeal had elapsed, the collateral bar rule was redundant with the rule of res judicata.

injunction is res judicata in subsequent civil proceedings to enforce it.

The relevant rules in this case are res judicata and lack of jurisdiction, not the collateral bar rule. Plaintiff seeks to enforce a final judgment, affirmed on appeal in 2004, with respect to which the time for certiorari or rehearing has long since expired. No one should be confused by the more limited reach of the collateral bar rule, which applies to quite different circumstances. The government is barred from relitigating either plaintiff's standing or the unconstitutionality of a government-sponsored cross at Sunrise Rock.

IV. The Plaintiff Has Standing.

A. The Government's Standing Argument Is Based on a Tendentious Distortion of Plaintiff's Declaration.

Plaintiff's sworn Declaration states:

> I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property. However, I do strongly object to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs. The presence of the cross on federally owned land in the Preserve deeply offends me and impairs my enjoyment of the Preserve.

Declaration of Frank Buono, ¶ 20 (Mar. 13, 2002), Jt. App. 64–65.

First, Buono's statement that he does not object to Christian symbols on private property does not deprive him of standing; the central issue to be decided at this stage of the litigation is whether the land has been sufficiently privatized.

Second, he does *not* say that violation of other people's free speech rights offends him; he says "the presence of the cross on federally owned land in the Preserve deeply offends me." His objection to government "allowing a symbol of one religion on government property that is not open to others" is simply a recognition of the facts of this case and of the meaning of government sponsorship. Government did not itself place the cross; government allowed private citizens to place the cross and it refused to allow other private citizens to place symbols of other faiths. Pet. App. 4a-5a. This preferential treatment is a form of government sponsorship of the cross. If the government had allowed all faiths to place their religious symbols at Sunrise Rock, there would have been a limited public forum instead of a government-sponsored cross. On any reasonable reading of his Declaration, Buono objects to the government-sponsored cross.

B. The Government's Standing Argument Is Inconsistent with the History and Purpose of the Establishment Clause.

Plaintiff does not lack standing either because he is objecting to a symbol of his own faith or because he is objecting to government sponsorship. It is enough that he sincerely objects to a government-sponsored religious symbol to which he is personally exposed. The government's argument to the contrary

misunderstands the Establishment Clause. *One* purpose of the Establishment Clause is to protect people from government imposition of other people's religions. But that was never the exclusive purpose. It was an equally important purpose to protect each person's own religion from the corrosive effects of government sponsorship.

The principal political forces demanding disestablishment were evangelical Christians opposed to government sponsorship of Christianity. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 343–47 (1996) (collecting sources); Esbeck, 2004 BYU L. Rev. at 1432–48, 1498–1524 (detailing the persistent work of the Baptist leaders Isaac Backus and John Leland). Of course they were opposed to government supporting Christian denominations other than their own. But when the defenders of establishment offered tax support to the evangelicals too, most prominently in the Virginia general assessment bill, the dissenters emphatically said no to government support of their own churches. It was evangelical petitions, with far more signers than Madison's *Memorial and Remonstrance*, and evangelical votes in the legislature, that swamped the general assessment bill. Buckley, cited *supra* at page 18, at 143, 175.

It was a central part of the dissenters' argument for disestablishment that government sponsorship corrupts and enervates religion. Roger Williams had argued in the seventeenth century for a "wall of Separation between the Garden of the Church and the Wildernes[s] of the World." Roger Williams, *Mr. Cotton's Letter, Lately Printed, Examined and Answered* (1644), in 1 *The Complete Writings of*

Roger Williams 313, 392 (Narragansett Edition, 1963 reprint). Dissenting religious leaders in the eighteenth century continued the argument on similar terms. After exhaustively reviewing the process of disestablishment, Professor Esbeck identifies at least eight related arguments:

> The arguments supportive of disestablishment, both by prominent religious figures as well as those more devoted to the guidance of reason, were: (1) that to be genuine in one's faith, religious belief and practice must be voluntary; (2) that establishment subordinates the church to the state, thus yielding jurisdiction over religious doctrine and governance for which the civil state is wholly without competence; (3) that establishment has a corrupting effect on the church and its clerics; (4) that as an institution that mediates between the state and the people, the churches presume to sit in judgment over, and thereby help limit, the state and its authoritarian pretensions; (5) that only a free and independent church will successfully exercise its prophetic voice and critique the state, a role important to limiting the state; (6) that a civil government that treats religions unequally will cause jealousy and resentments within the body politic; (7) that religion, if vibrant and respected, can help temper selfish passions and oppressive tendencies and thus protect against harmful swings in popular sentiment to which republics are vulnerable; and (8) that religion, when perverted into a civil religion, collapses

> two very different and very powerful allegiances, risking a dangerous confounding of God and country, faith and nationalism.

Esbeck, 2004 BYU L. Rev. at 1581. Each of these arguments is fully applicable to government support of one's own faith. Of course Islam has taken a different view in the countries where it is numerically predominant, with very different results. But these were the arguments of the American Christians who successfully worked for disestablishment. The argument developed in this way because the last offer from the supporters of establishment was some form of nonpreferential aid that would include, or could be argued to include, all forms of Christianity. *See* Laycock, 27 Wm. & Mary L. Rev. at 895–902 (reviewing proposals for nonpreferential aid in Virginia, Maryland, Georgia, and South Carolina, and local option systems, presented as fair to all denominations, in Massachusetts, Connecticut, New Hampshire, and Vermont). But that last ditch offer failed, because the opponents of establishment were opposed to the establishment of any religion, including their own.

This fear that government support will corrupt religion has motivated religious opponents of establishment throughout American history. So it is no surprise that Establishment Clause plaintiffs often object to support of their own religion. *See* Resp. Br. 24–25 and cases cited; *see also Santa Fe Independent School District v. Doe*, 530 U.S. 290, 294–95 (2000) (Catholic and Mormon families challenged "overtly Christian prayers").

V. Congress Has Not Remedied the Constitutional Violation, Because It Has Not Fully Privatized the Cross.

Putting the best possible face on the legislation in this case, the government says that Congress attempted to remedy the constitutional violation by directing that the cross and an acre of surrounding land be conveyed to the local VFW. Pet. Br. 20. The government also relies on the settled principle that private speech promoting religion is protected by the Free Speech and Free Exercise Clauses. *Id.* at 21.

But for religious speech to be private under that principle, government must do nothing to promote or prefer it. "[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion of Scalia, J.). Chief Justice Rehnquist, and Justices Kennedy and Thomas, joined this opinion.

This Court has decided several cases in which government maneuvered to promote or arrange for religious speech while attempting to create an appearance of privatization. The Court has rejected all such efforts. A school board does not successfully privatize prayers by delegating the decision to a student election and an elected student speaker, even if the elected speaker can choose whether to pray. *Santa Fe*, 530 U.S. at 302–05. It does not privatize prayer by inviting student volunteers to lead the prayer, *Treen v. Karen B.*, 455 U.S. 913 (1982), or by inviting a clergyman, *Lee v. Weisman*, 505 U.S. at 587–88. A state does not privatize

religious displays by inviting citizens to donate copies of the Ten Commandments. *Stone v. Graham*, 449 U.S. 39, 42 (1980). There was a private speaker in each of these cases, but the dispositive facts were that government encouraged or arranged for the religious speech or gave preferential treatment to the private religious speaker.

The test is not who owns the property, but whether the government plays any role in promoting the religious speech. Privately initiated religious speech that gets no preferential treatment is private for Establishment Clause purposes even on government property. *Good News Club v. Milford Central School*, 533 U.S. 98, 112–20 (2001); *Pinette*, 515 U.S. at 761–70; *Board of Education v. Mergens*, 496 U.S. 226, 247–53 (1990). The test is the government's role in promoting or arranging for the religious speech, and preferential use of government property is only one way to promote religious speech.

Here, we have continuing government sponsorship; we also have an adjudicated constitutional violation. Plaintiff is entitled to a remedy that eliminates the violation and all its consequences, and restores as nearly as possible the situation that would have existed if the violation had never occurred. *United States v. Virginia*, 518 U.S. 515, 547 (1996). As Chief Justice Burger said in a discrimination case, "The remedy is necessarily designed, *as all remedies are*, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (emphasis added). "[W]e must continue to . . . afford remedies that eliminate not only the discrimination but its identified consequences." *Freeman v. Pitts*,

503 U.S. 467, 506 (1992) (Scalia, J., concurring). "The judicial remedy for a proven violation of law will often include commands that the law does not impose" in the absence of a violation. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 n.22 (1986).

The violation here includes discrimination—preferential access for the Christian message of the cross and for the VFW and the Sandozes. The violation includes the reality and perception that government is sponsoring the sectarian message of the cross by this preferential treatment. The remedy must end the discrimination and end both the reality and perception of government sponsorship. The remedy must end any residual uncertainty about who sponsors the cross, both because such uncertainty sustains the perception of government sponsorship and because such uncertainty is a consequence of the past violation.

A complete remedy therefore requires several elements:

1) The national memorial designation must be repealed or invalidated. It is not just the site, but the cross itself that has been designated as a national memorial. "The five-foot-tall white cross [described by history and location] as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial." Pub. L. 107–117, §8137(a), Jt. App. 44. The memorial has been named the "White Cross World War I Memorial." 16 U.S.C. §431 note (2006). The government cannot continue to sponsor a national memorial that honors only Christian veterans.

2) The reverter clause must be repealed or invalidated. Even though the reverter clause does not explicitly require a cross, it limits the use of the land to a narrow category that includes the existing cross. By eliminating most other options, it creates pressure to retain the cross. Together with the national memorial designation and the name of the memorial, the reverter clause serves as an obvious signal about the intended use of the land. The VFW would not feel entirely free to remove the white cross from the "White Cross World War I Memorial."

The reverter clause, and the name of the Memorial, are like the restrictions on the student speaker in *Santa Fe*, which did not explicitly require prayer but sharply limited the speaker's options and pressed in the direction of prayer. *See Santa Fe*, 530 U.S. at 306–07. Government cannot press for a religious display, especially when it is responsible for curing an adjudicated violation.

3) The transfer of the cross must be made visible on the ground. Fencing and signage must make it readily apparent to all observers that the government's sponsorship of the cross has ended. Signage indicating that the cross is privately owned must be visible on Cima Road to drivers in each direction; these drivers are the primary audience for this cross. A plaque at the base of the cross helps little; it will be visible only to those few persons who park and brave a steep ascent on bare rock to reach the cross. *See* Brief of Amici Curiae Veterans of Foreign Wars *et al.*, App. 13a (photograph of Sunrise Rock showing both the relative inaccessibility and the high visibility of the cross).

4) Any other interested persons must be given a fair opportunity to acquire the land in

open bidding. A preferential sale to the VFW and the Sandozes, even at appraised value, is no remedy at all for the longstanding preferential access given to the VFW and the Sandozes.

The judgment below, enjoining transfer of the property on the terms enacted by Congress, is necessary to make possible the fourth element of this remedy. The other three parts of an effective remedy could be implemented on remand, or on further motion in the district court, even if the land were transferred in the meantime.

CONCLUSION

The judgment below should be affirmed. The case should be remanded to the district court for implementation and enforcement of a complete remedy, either by removing the cross or by completely, publicly, and visibly privatizing the cross.

Respectfully submitted,

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August 3, 2009